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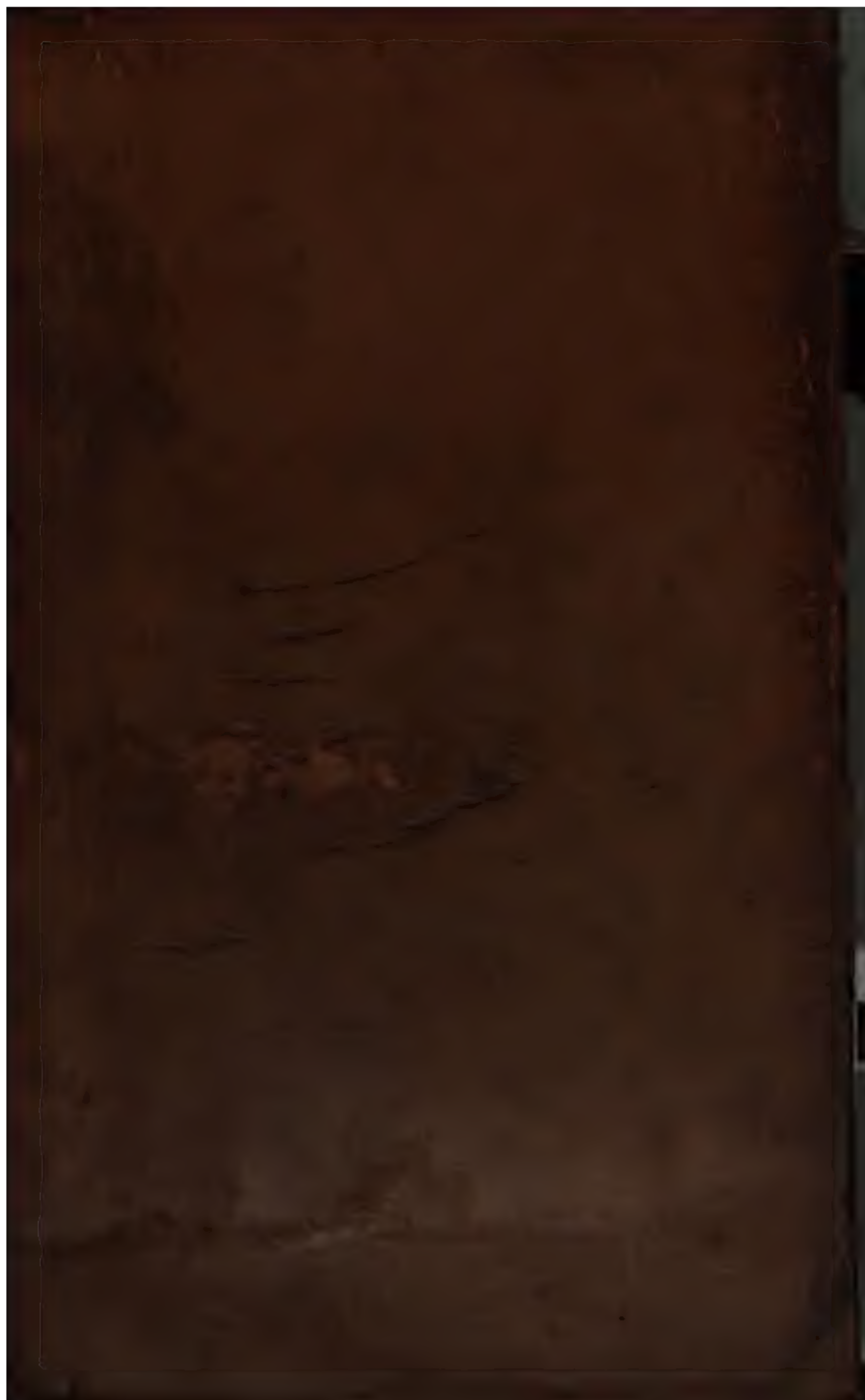
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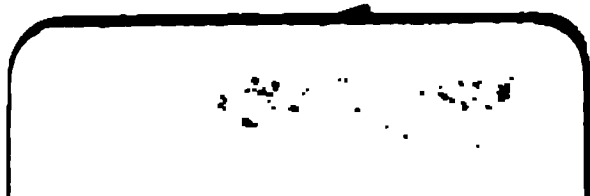
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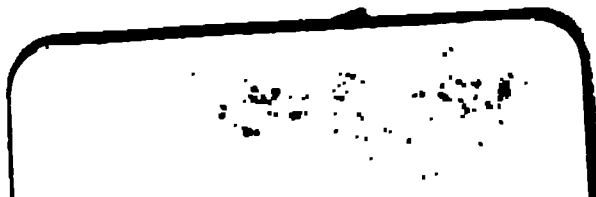
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R E P O R T S
OF
C A S E S
IN THE
High Court of Chancery,
FROM 1757 TO 1766.
FROM THE
ORIGINAL MANUSCRIPTS
OF
LORD CHANCELLOR NORTHINGTON.
COLLECTED AND ARRANGED,
BY THE
HONOURABLE ROBERT HENLEY EDEN,
ONE OF THE MASTERS IN CHANCERY.

SECOND EDITION,
WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.
VOL. I.

Me non accipere modo hæc a Majoribus voluit, sed etiam Posteris prodere.

LONDON:
JOSEPH BUTTERWORTH AND SON,
43, FLEET STREET.

1827.

G. WOODFALL, ANGEL COURT, SKINNER STREET, LONDON.



TO

THE RIGHT HONOURABLE

JOHN, EARL OF ELDON,

&c. &c. &c.

MY LORD,

It is now some years since I received your LORDSHIP's permission to dedicate to you the first Edition of these Decisions. In submitting them to the public, I considered it to be a duty which I owed to the eminent Person from whom they were transmitted to me, to endeavour to procure for them no less an honor than your LORDSHIP's patronage. The success which they have obtained has given me the satisfactory assurance, that neither the zeal of an Editor, nor the partiality of a Grandson, had tempted me to obtrude upon your LORDSHIP, productions unsuitable to the dignity of your wisdom and learning.

The elevated station which your LORDSHIP then occupied, a due sense of the great distance at which I was placed from you, with a certain fear lest the language of admiration or of gratitude might be construed into adulation, restrained me from expressing the sentiments which I then felt, and shall ever feel,

for your great and spotless character. I therefore contented myself with simply prefixing your venerated Name to the work.

Time however, my LORD, has conquered the diffidence which once prevented me from addressing you; and as retirement from power has been truly said to sanctify and canonize a great character, I now venture to offer that respectful tribute, which I had formerly been induced to withhold. Permit me, therefore, in presenting to you the Second Edition of these Cases, to record with sentiments of the sincerest gratitude, my deep sense of the many favors which you have conferred upon me: from the first kind personal notice with which you honored me, at a time when such an honor was of no ordinary value, down to that great mark of confidence which your LORDSHIP gave me, in promoting me to an honorable and important office in the Court where you have so long presided.

During the space of more than a Quarter of a Century,—a period much exceeding the judicial life of any of your predecessors,—it has been your LORDSHIP's praise to have given the last hand to the most finished and perfect system of Equity in existence. As long as the structure raised by the Ellesmeres and Nottinghams, the Somerses and Hardwicks, endures, your admirable judgments which have so symmetrized and refined it, will descend with it in honor to Posterity. But though the volumes which record them will ever be consulted with advantage,

DEDICATION.

v

and perused with admiration, none but those who have themselves been witnesses of your sagacity, your patience, and your energy, of your unwearied diligence, of your equal temper, of your gentle and condescending manners, can form a complete idea of the transcendent merits of your judicial character. An union of many great and rare excellencies present in your LORDSHIP, the truly virtuous and exemplary Magistrate; the consistent Politician; the most profoundly learned and accomplished Lawyer either of ancient or modern times; one of the greatest, wisest, and best Men of the age.

That your LORDSHIP may long enjoy the well earned reward of so many years of honorable labor, in the gratitude of your Country, and the love and veneration of a Profession which you have so much elevated and adorned, is the sincere and respectful wish of,

MY LORD,

Your Lordship's most obliged

and grateful servant,

ROBERT HENLEY EDEN.

Southampton Buildings,
Oct. 25, 1827.

PREFACE.

THESE volumes contain the principal decisions of Lord Chancellor *Northington* from the year 1757 to 1766 ; a period during which, it has been observed, that an unusual proportion of cases of difficulty and importance were brought under the consideration of the Court of Chancery.

The judicial character of the eminent person who determined them, has long stood high in the estimation of the profession. The modern cases, in which the authority of Lord *Northington* has come under consideration, evince the marked respect with which Lord *Thurlow*, Lord *Alvanley*, Lord *Eldon*, and other great judges, have treated his decisions.

It is however remarkable, that the only published collection of the cases determined by him, is that of Mr. *Ambler* ; and it has been a frequent subject of regret that one, who, by a practice of upwards of forty years, was apparently so well qualified to publish the result of his experience, should have failed so lamentably in the task which he undertook. His reports are well known to be an extremely careless and imperfect production. The facts of most of the

cases are stated shortly and defectively; in many the dicta of the judges, in some even the points themselves have been erroneously reported. The only notice which some of the most important cases in the book have received, is a short memorandum of the point determined. The notes taken in the earlier part of his life evidently bear few marks of subsequent revision; and the frequent discovery of errors has given a reputation for inaccuracy to the publication, which has deprived it of the weight to which it would have been entitled from the respectable name which is prefixed to it.

The number of cases which have appeared in other publications also is extremely small. The important case of *Burgess v. Wheate* (in which Lord Keeper *Henley* and Sir *Thomas Clarke* differed in opinion from Lord *Mansfield*) had, with some few inaccuracies, been published in the Reports of Mr. Justice *Blackstone*, from the relation of Mr. *Fazakerley*. That great lawyer wrote a very elaborate comment upon the case, in which he espoused the doctrine of Lord *Mansfield*; a copy of it, to which the Editor has occasionally found it necessary to refer, is preserved among Mr. *Coxe's* MSS. in the library of Lincoln's Inn. Reports of some few of his Lordship's judgments have also appeared scattered among various modern publications(*a*); and three short cases are introduced in the collection published by Mr. *Cox*.

(*a*) *Burn's Eccl. Law.* *Collect. Jurid.* *Term Rep.* *Harg. Co. Lit. &c.*

The Editor, who, as the grandson of Lord *Northington*, is in possession of his law MSS., a great portion of which consist of notes taken by himself while he presided in the Court of Chancery, has therefore been induced to supply this singular deficiency in the reports of that period; and has collected into one publication all the cases of importance which were determined by his ancestor. In reporting those which have previously appeared in print, where deficiencies existed they have been supplied; where errors were discovered they have been corrected; and the authenticity of those parts which have been found accurate, has been ascertained and fixed from the most unquestionable authority. The present collection also contains a number of cases which have frequently been referred to as existing in public or private collections, and handed about and cited in MS.; and it comprises reports of many determinations of considerable importance, which are not contained in any collection to which the Editor has had access, and which appear never to have been referred to.

The great source from which the materials for the present publication have been drawn, are Lord *Northington's* MSS., consisting of six volumes of note books, and a large quantity of loose papers. The note books contain the statements of the facts, and the arguments of counsel, as taken down by his Lordship with great diligence and minuteness. In cases reserved for consideration, the reasons of his determination are generally inserted at the conclusion of the

argument. In others of still greater difficulty, and such as appear to have occupied the fullest share of his attention, the judgments are found written out at length on separate papers; and they were probably read in court in the same state in which they now appear. Where less deliberation was necessary, and his opinion was given at the time of the argument, a short note is often added of the grounds upon which it was founded, and the reasons which he adduced in support of it.

The Editor has also made the most careful research into the valuable collection of MS. Reports in the library of the Society of Lincoln's Inn. A large portion of these, were, as it is well known, the property of the learned Serjeant *Hill*; and the cases determined in courts of equity, many of which are very valuable, were presented to him by the several eminent persons whose names they bear. This library likewise contains the MSS. of Mr. *Coxe*, who was in considerable practice in the Court of Chancery, during the time of Lord *Northington*, and appears to have taken very correct and copious notes of cases in which he was engaged. The collections of both these learned persons have given the Editor many opportunities of supplying the deficiencies which existed in his own materials.

Extensive assistance has also been derived from the voluminous MSS. of Mr. *Hargrave*, deposited in the British Museum. This valuable and extensive collection contains copies of all the MSS. of the

learned and laborious Sir *Thomas Sewell*. Among these is a volume of cases determined by Lord *Northington*, reported by Mr. (afterwards Baron) *Perryn*, and two considerable volumes of notes of his Lordship's judgments, taken by Sir *Thomas Sewell* on the backs of his briefs, during the latter years of his practice, which was almost exclusively confined to the Court of Chancery.

To private communication the Editor has been indebted for the inspection of the MSS. of Mr. *Ambler*, and the late Mr. Justice *Aston*. The former, which were in the possession of the late Sir *John Simeon*, contain reports of several cases which were omitted in the printed collection. It does not appear, that this omission originated from any other cause than carelessness or mistake, as some of them are upon very important points, and determined upon principles as sound, and reported with as much copiousness and accuracy, as any which he has thought proper to publish. The latter were sold with the library of the late Lord C. B. *Thompson*. They contained reports of several cases determined by Lord *Northington*, with a sight of which the Editor has been favoured.

The Editor has considered it an indispensable duty to collate every case with the note of it in the Register's Book; from which he has found it expedient, in many instances, to extract the statement of facts. Where no note appeared in the Register's Book (as it frequently happened), he has always had recourse,

for the decree, to the entry in the Minute Book. In the same manner, in the few instances where it was requisite, he has referred to the book of the Secretary of Bankrupts. This mode of insuring accuracy was first adopted by Mr. *Cox* in his excellent edition of *Peere Williams*, and the Editor has, in imitation of another plan which is pursued in that work, added to every case notes of subsequent decisions, which have been brought down to the latest period. He has also, in many cases where he found that it might be useful, subjoined a short digest of the doctrine as established or varied by subsequent cases, and the extent to which it has been carried by them. He has made it his endeavour to follow the example of Mr. *Cox* in method and arrangement, and trusts that he may have succeeded in resembling him in fidelity and accuracy.

In an Appendix are inserted two articles of considerable curiosity and importance. The one is the opinion returned by the judges, who were consulted (previous to the court martial held upon Lord *George Sackville*), as to the jurisdiction of a court martial over an officer who had been dismissed from the service for an offence committed by him while in actual pay. The other is an extremely elaborate argument, written by Lord C. B. *Parker* upon the effect of Lord *Ferrers's* attainder for felony operating as a forfeiture of his dignities. It is inserted more in consequence of the great depth of research which it dis-

plays, and out of respect to the profound learning of its author, than from any doubts which it can now be found necessary to remove.

It may not be an improper conclusion to these observations to subjoin the following short account of the distinguished person to whom they relate.

ROBERT HENLEY (afterwards Lord Keeper and Chancellor, and Earl of *Northington*) was descended from the ancient family of the *Henleys*, of *Henley* in *Somersetshire*, advanced to the dignity of the baronetage in 1660; various branches of which appear at different times to have been settled in *Hampshire*, *Somerset*, and *Dorset*.

His great grandfather, Sir *Robert Henley*, was Master of the Crown Office, from the profits of which he left to his son an estate of above £3000 *per ann.*, (in those days, a most ample fortune), principally consisting of the ground rents of *Lincoln's Inn Fields*. He settled at *The Grange*, in *Hampshire*, where his mansion, built by *Inigo Jones*, was afterwards, when in the possession of his descendant, the Lord Keeper, honoured with the approval of the fastidious *Horace Walpole* (a).

His third son, Sir *Robert Henley*, who sat in 1679 for the Borough of *Andover*, was the father of a numerous family, the eldest of whom was *Anthony Henley*.

(a) This place was sold at the death of the second Earl of *Northington*, and is now in the possession of *Alexander Baring*, esq.

The name of ANTHONY HENLEY frequently occurs in the memoirs and correspondence of the reign of Queen *Anne*, as one of the politest and most accomplished men of the day. He was the friend of the Earls of *Dorset* and *Sunderland*, an occasional contributor to some of the best periodical publications, and the companion and correspondent of *Swift*, *Pope*, *Hoadley*, and *Garth*, the last of whom dedicated to him his *Dispensary*. He served in several parliaments during the reigns of *William III.* and Queen *Anne*, for *Andover* and *Weymouth*; but though a firm adherent to the Whigs, who were then in power, he never held any situation under government. He married *Mary*, daughter and co-heiress of the honourable *Peregrine Bertie*, second son of *Montague*, Earl of *Lindsay*, the ancestor of the Dukes of *Ancaster*. He died in *August*, 1711, leaving three sons, *Anthony*, who died without issue in 1745, having married *Elizabeth*, eldest daughter of *James*, third Earl of *Berkeley*, ROBERT, and *Bertie*, who was in orders, and died unmarried in 1760.

ROBERT, his second son, is the subject of this memoir. The Editor has not been able to discover the exact date of his birth, which must have been about the year 1708. He received his education, like Lord *Mansfield*, at *Westminster*; and was entered at *St. John's College, Oxford*, on the 19th of *November*, 1724, when he is stated to have been only sixteen years of age. On the 3d of *November*, 1727, he was elected a fellow of *All Souls*; but not being of

founder's kin, was not admitted till the following year. He took his degree of Master of Arts on the 5th of *July*, 1733.

He commenced his professional career by entering at the Inner Temple on the 1st of February, 1728, and was called to the Bar by that Society on the 23d of *June*, 1732 (*a*). His family connexions induced him to make choice of the Western Circuit, of which he became in due progress, and continued to the last, the acknowledged leader. He was also Recorder of Bath, and represented that place in Parliament from the year 1747 until his subsequent elevation to the Seals in 1757.

In the House of Commons, he was a regular supporter of the politics of *Frederick*, Prince of *Wales*, and formed, with Sir *Thomas Bootle*, (the Chancellor of the Duchy,) Dr. *Lee*, Mr. *Forrester*, *Hume Campbell* (*b*), and Mr. *Hussey*, the legal portion of that party, which was designated by the appellation of *Leicester House*.

In the publication of the parliamentary debates, Mr. *Henley*'s name does not often occur; but

(*a*) He was admitted to the Society of Lincoln's Inn on the 22d of April, 1745; but his admission was only for the purpose of holding chambers, as he continued of the Inner Temple, of which he was made a Bencher in Mich. Term, 1751.

(*b*) *Hume Campbell* was Attorney-General to the Prince, but resigned that post when his Royal Highness organized his last opposition. *Walpole* says, that he was supposed to have received a considerable pension for his succession. He afterwards got the office of Lord Registrar of Scotland for life.



it appears, from *Walpole*, and other contemporary memoirs and letters, that he was a frequent and active, if not a very eminent and successful, debater.

When the death of the Prince deprived the party of their head, several of the members seceded from it, and, like the shameless *Dodington*, made overtures of submission to the ministers. Mr. *Henley*, however, continuing firmly attached to the family of his royal patron, acquired the esteem and confidence of the Princess Dowager, and laid the foundation of that favour with the future Monarch, to which he was indebted for great part of his subsequent elevation. In *Michaelmas* term, 1751, he was gratified with the situation of Solicitor, and soon afterwards with that of Attorney-General to the new Prince of *Wales*, and in consequence of that appointment, was made King's Counsel.

In *May*, 1756, an important vacancy was occasioned by the sudden death of Lord C. J. *Ryder Murray*, in accordance with his constant assertions that he meant to rise by his profession, and not by the House of Commons, insisted upon his right, as Attorney-General, to succeed to the vacant post. It was in vain that the Duke of *Newcastle* used every art of persuasion, and exhausted every inducement to tempt him to continue in the House of Commons. It is even said that great offers(*a*) were made to him

(*a*) *Walpole* says, that they offered him the Duchy of Lancaster for life, with a pension of £2000, permission to remain Attorney-General, and the reversion of the First Tellership of the Exchequer

if he would but decline, for eight months, the chief-justiceship and the peerage which was to accompany it. Such was the state of distress to which the disgraceful loss of *Minorca*, and the affair of *Byng*, had reduced the minister. *Murray* at last peremptorily said that, if he was not to be Chief Justice, neither would he be any longer Attorney-General; and accordingly, after the situation had been vacant upwards of five months, he was elevated to it on the 6th of *November*, 1756.

Several other important legal changes, at the same time, took place in consequence of the resignation of the Duke of *Newcastle*, and the establishment of what is usually termed Mr. *Pitt's* first ministry. Lord *Hardwicke* resigned the Great Seal, which was given in commission to Lord C. J. *Willes*, *Wilmot* and *Smythe*. Mr. *Henley* having been knighted, was (as *Walpole* asserts, through the influence of *Fox*) appointed to the situation of Attorney-General; and *Charles Yorke* was made Solicitor-General, in the room of Sir *Richard Lloyd*, who was displaced. During this short administration, and the unsettled period which succeeded it, Sir *Robert Henley* continued as for his nephew, Lord *Stormont*. At the beginning of *October*, they bid up to £6000 a year in pension. They pressed him to stay but a month, nay only to defend them on the first day. All this is probably exaggerated, and tinged with *Walpole's* usual spite against the Duke of *Newcastle*. It is however obvious, from the circumstance of ministers keeping so important a post vacant during a period which included a whole term and a circuit, that some difficult and important negotiation was on foot respecting it.

Attorney-General. In this situation, conformably to what had been usual upon promotion to the post of *Attorney or Solicitor-General*, he left the King's Bench, where he had been in great practice, and removed to the Court of Chancery. He was, however, not long to remain in that court in a subordinate situation.

The extraordinary state of parties which had been produced by the dismissal of Mr. Pitt and Mr. Legge, in April, 1737, and the active but ineffectual attempts of the King to form new arrangements, were terminated in June by the celebrated coalition which took place between *Leicester-House*, the Duke of Newcastle, Mr. Pitt, and the Tories; and the sovereign was reluctantly compelled to accept an administration composed of a union of these discordant materials.

In the discussions previous to the final arrangement of the ministry, considerable difficulty was experienced as to the manner in which the Great Seal was to be disposed of. Lord *Mansfield*, whose acceptance of it would have been satisfactory to all parties, was known to be unwilling to quit his less elevated, but more permanent situation. It was therefore offered to Lord C. J. *Willes*, with the title of *Lord Keeper*, but without a peerage, or a retiring pension. The proposal, however, was declined, in the hopes, perhaps, of more honourable and advantageous terms. The arrangements, in the mean time, drew to a close without even a repetition of the offer.

The Duke of *Newcastle*, who conducted the negotiation with Mr. *Pitt*, earnestly pressed, as the king's particular request, that Lord *Hardwicke* might have a seat in the cabinet. Mr. *Pitt* consented upon certain conditions, one of which was, that Sir *Robert Henley* should have the Great Seal; a stipulation which had been made on the part of *Leicester-House*, as the reward of his long and faithful adherence to its politics (*a*). He was accordingly elevated to that high station upon the terms on which *Willes* had refused it (*b*), and was on the 30th of *June*, 1757, sworn into the office of Lord Keeper (*c*).

His new and elevated situation was attended with

(*a*) *Coxe's* Mem. of *Horatio* Lord *Walpole*. Life of Lord *Chatham*. *Dodington's* Diary.

(*b*) Lord *Waldegrave* states in his Memoirs that Lord *Northington* received with the Seals a retiring pension and a reversion of a Tellership of the Exchequer; but this is erroneous.

(*c*) There is an amusing anecdote respecting this transaction, which the Editor has frequently heard the late Lord *Ellenborough* relate with his characteristic humour. After the Chief Justice of the Common Pleas had refused the Seals, the Attorney-General called upon him one day at his villa, and found him walking in his garden, highly indignant at the affront which he considered he had received in an offer so inadequate to his pretensions. He instantly entered into a detailed account of his grievances, concluding his statement by asking whether any man of spirit could, under such circumstances, have accepted such an offer; adding, "Would you, Mr. Attorney, have done so?" *Henley*, thus appealed to, gravely told him, that it was too late to enter into such a discussion, as he was then waiting upon his lordship in order to inform him that he *had actually* accepted them.

no small degree of difficulty and anxiety. To follow, as his almost immediate successor, the great and accomplished magistrate who had held the Great Seal for nearly twenty years with such extraordinary reputation, was in itself no enviable task. He had besides the mortification of being compelled, for nearly three years, to preside in the House of Lords as a Commoner; while the office of directing that assembly, when sitting in its judicial capacity, devolved exclusively upon Lord *Hardwicke* and Lord *Mansfield*. As they were neither of them united with the new *Lord Keeper* either by personal or political connexions, and were supposed to regard his elevation with no very favorable aspect, appeals from the Court of Chancery became as frequent, as the exclusion of all Law Lords from the House, during the period that Lord *Hardwicke* was Chancellor, had rendered them uncommon.

It is nevertheless remarkable, that, during the Nine years in which Lord *Northington* held the Seals, as Keeper and Chancellor, there were but six of his decrees which were ever either reversed or materially varied by the House of Lords (*a*). Whether the conclusions to which the House arrived, even in these few instances, were in unison with the received

(*a*) They consist of the following: *Attorney-General v. Wall*, 4 Bro. P. C. Ed. Toml. 665. *Richardson v. Chapman*, 7 ib. 318. *Pelham v. Gregory*, 3 ib. 204. *Earl of Buckinghamshire v. Drury*, Vol. II. 60, 3 ib. 492. *Herbert v. Earl Powis*, 1 ib. 145. *Lord Beaulieu v. Earl of Cardigan*, 3 ib. 277.

opinions of the profession ; whether some of them have not with justice encountered the disapprobation of succeeding judges, it is not now important to consider. It is sufficient to assert, that they have in no degree impaired the great authority of Lord *Northington's* name. It may here too be observed, that the number of his decisions which have been overruled or shaken by subsequent determinations, is extremely small ; and that in some instances, where later decisions had gone in contradiction to his declared opinions, maturer deliberation and more extensive inquiry into principles and cases have established the authority of the original determination.

Lord *Hardwicke's* strong personal influence over *George* the Second, and that monarch's natural jealousy of the Lord Keeper's connexion with *Leicester-House*, would probably have excluded him from the honour of the peerage during that reign. It was to the accident of Lord *Ferrers's* trial that he owed his immediate elevation to it. It was thought proper that the first law officer should, on that occasion, as usual, preside as Lord High Steward. He was accordingly, by letters patent, bearing date the 27th of *March*, 1760, created Baron *Henley* of *The Grange*, in the county of *Southampton* : but he still continued to hold the Great Seal, with the title only of Lord Keeper.

Horace Walpole, both in his Memoirs and his private correspondence, notices with much spleen the want of dignity in the Lord High Steward in the

conduct of this memorable trial. It is difficult to know the exact degree of credit which can be given to the representations of a writer, actuated, like *Walpole*, with such indiscriminate malignity towards every public man of every party. The truth of the charge, therefore, cannot now be ascertained; nor, if true, is it one of great importance. It must however be observed, that the sentence in which judgment was pronounced upon the unhappy Prisoner, is one of the best specimens of judicial eloquence in existence. It is at once grave, simple, dignified and affecting (*a*).

The accession of *George* the Third made a material alteration in the Lord Keeper's fortunes and prospects. The situation to which he had been raised by the force of unforeseen political combinations, and which he had retained in opposition to the wishes of the late monarch, he now enjoyed in the full confidence and favour of the present. His new master conferred upon him an early and flattering mark of his regard, which was soon followed by a liberal extension of honours and patronage. On the 16th of *January*, 1761, having delivered the Great Seal to his Majesty, he received it back with the title of Lord Chancellor. By letters patent, bearing date the 19th of *May*, 1764, he was created

(*a*) The reader will find it inserted in the Appendix. It is curious to observe, that Mr. Justice *Buller* in pronouncing judgment of death upon *Donnellan*, adopted several sentences from Lord *Northington's* address *verbatim*.

an Earl by the title of Earl of *Northington*, in the county of *Southampton* ; and on the 21st of the following *August*, on the death of the Marquis of *Caernarvon*, was made Lord Lieutenant of *Hampshire*.

The station of Lord Chancellor continued to be occupied by him under the three successive administrations of Lord *Bute*, the Duke of *Bedford*, and Lord *Rockingham*. His health, however, had latterly become extremely precarious : his constitution was so impaired by severe and repeated attacks of the gout, that he had frequently, and for considerable intervals, been incapacitated from performing the laborious duties of his office. He had therefore for some time desired an honourable and quiet retreat. The feeble state also of the *Rockingham* administration, to which he had never been cordially attached, induced him, possibly, to contribute his endeavours to effect a change by which this retreat might be secured. It is certain, at least, that the immediate and apparent cause of their dismissal may be attributed to him. A report, drawn up by the Attorney and Solicitor-General for the civil government of *Quebec*, having been submitted to the cabinet, the Lord Chancellor condemned the measure with unusual acrimony and indignation.

According to Mr. *Adolphus*'s account of this transaction, (whose private information respecting the events of this period is extremely valuable,) at the first meeting of the cabinet which took place at the Lord Chancellor's house, he declared an entire disappro-

bation of the report, objected to some particular regulations, and gave it as his opinion that no propositions could be sanctioned by the cabinet till they had procured a complete code of the laws of Canada ; a suggestion which, if complied with, would occasion the delay of a whole year. The Lord Chancellor also complained of some instances of inattention which he had experienced. The meeting was dissolved without coming to any definitive resolution, and before a new one could be convened he declared his resolution to attend no more.

On a subsequent day, Lord *Northington* obtained an audience from the King, when he informed him that his ministry could go on no longer : he declined in terms of the utmost plainness attending any more cabinet meetings, and recommended his Majesty to send for Mr. *Pitt*. This advice having been favourably received, the royal commands were given to the Chancellor to confer with that statesman on the subject of a new ministry. This conference, which took place on the 12th of *July*, 1766, was opened by the offer of a *carte blanche* ; General *Conway*, who retained his situation as Secretary of State, assisting in the negotiation. Mr. *Pitt*, thus supported, formed the plan of the new administration without communication with Lord *Temple*, who was on the following day sent for from Stowe, and on the 15th had an audience with the King, at which Lord *Northington* was present. After an unsatisfactory conference between Lord *Temple* and Mr. *Pitt* on

the following day, at which the former found that all the situations had been disposed of, without due regard to himself or his friends; a last interview took place between Lord *Temple* and the Chancellor on the evening of the 17th, when he told him that the farce was at an end, the mask taken off, and that he need not have sent for him out of the country, as there never was any serious intention of employing him. Thus was the friendship between the two brothers-in-law, which had existed for so many years, dissolved in anger, and Mr. *Pitt* left to the formation of a ministry embarrassed by the secession of so powerful a coadjutor.

The result of the negotiations, as it related to the public, was, that the Duke of *Grafton* was placed at the head of the Treasury; Charles *Townshend* was made Chancellor of the Exchequer, with the lead of the House of Commons; Lord *Shelburne* was appointed Secretary of State for the southern department; and Lord *Camden* was raised to the office of Lord Chancellor; the Marquis of *Granby* was placed at the head of the Admiralty; and Mr. *Pitt*, though in fact Prime Minister, took the office of Privy Seal, and was created an Earl.

As far as this arrangement affected Lord *Northington* personally, his desired retirement was provided for in the most honourable and gratifying terms. He was appointed to the easy station of President of the Council, with an additional pension of £2000 per annum, and a stipulation for an in-

crease of that pension to £4000 per annum on his resignation of the office : the reversion of the Hanaper for two lives, after the demise of the Duke of *Chandos*, was also secured to him. Accordingly, on the 30th of *July*, 1766, he took his seat as President of the Council, and the Great Seal was delivered to Lord *Camden*.

The gout, which had become more frequent and violent in its attacks, soon rendered it impossible for him to retain his new situation. The last effort of his public life was a very powerful and manly speech, which he delivered on the debate in *November*, 1766, on the Address respecting the Embargo which had been laid, in consequence of the scarcity, upon the ships preparing to sail with cargoes of grain (*a*). In the end of *June*, 1767, he declared to his Majesty his resolution to resign, in consequence of his ill state of health, and his inability to attend the duties of his post. From that time to his death, which happened on the 14th of *January*, 1772, he took no further part in public business.

“ Lord *Northington*,” (as has been truly observed by the very highest living authority (*b*),) “ was a great lawyer and very firm in delivering his opinion.” He brought with him to the Bench a profound and extensive knowledge of the law, an enlarged and vigorous understanding, a firm and decisive mind.

(*a*) This speech is not in the Parliamentary Debates : it is abstracted at some length in Mr. *Thackeray's* Life of Lord *Chatham*.

(*b*) Lord *Eldon*, 6 *Vcs.* 640. 3 *Bos.* and *Pul.* 315.

Their effects were soon felt in an admirable despatch of the business of his court ; and they are conspicuous in the clear, simple, and manly style of his judgments (*a*).

In private life he is reported to have been an extremely agreeable companion. Fond of the pleasures of convivial society (*b*), he animated it by a strain of vigorous wit, and an originality of expression in which he was followed, and perhaps outdone, by his great successor, Lord *Thurlow*. Indeed, in several of their colloquial peculiarities, in a certain contempt of all false pretence, and perhaps a blameable disregard of some of the minor regulations of polite society, there was a strong resemblance between these two eminent men. But here the parallel stops : for as Lord *Thurlow* excelled him, as indeed he did

(*a*) The general reader may peruse with interest the case of *Norton v. Relly*, Vol. II. p. 286. where Lord *Northington* set aside a security obtained by a methodist preacher from a woman in a state of religious delusion ; and the judgment in the great case on *John, Duke of Marlborough's* will, Vol. I. p. 404. the style of which rises to a tone of eloquence not frequently found in arguments purely technical. The professional reader may be particularly referred to the judgments in *Fanshaw v. Rotheram*, Vol. I. p. 276. *Drury v. Drury*, Vol. II. p. 39. and the great case of *Burgess v. Wheate*, Vol. I. p. 177. as most finished specimens of judicial reasoning.

(*b*) *George III.* used to relate with great delight the circumstance of Lord *Northington* requesting his permission to abolish the Chancellor's evening sittings on Wednesdays and Fridays during term, in order that he might have time to finish his bottle at his leisure ; a permission which his Majesty, for so excellent a reason, most graciously accorded.

most other men, in the immense vigour and capacity of his mind, so on the other hand, it must be recorded that Lord *Northington*, notwithstanding a certain roughness of manner, and peculiarity of diction, possessed many of the accomplishments and all the virtues which adorn domestic life. He was a sincere and generous friend (*a*), an affectionate husband, and an indulgent parent. The delight which he experienced in the society of his daughters, and especially of Lady *Bridget Tollemache*, was a constant relief to him after the fatigues of public life; and as the wit and powers of conversation of this his eldest and favourite daughter were of the most brilliant order, he derived equal pride and satisfaction from their display.

Lord *Northington* was in his person of the middle height, and rather thin. His portrait, by *Hudson*, represents him as extremely handsome in the face, and as retaining, even after his elevation to the Seals, a degree of colour and freshness which is not often preserved by those who have won their way to this exalted station.

He married in *December*, 1743, *Jane*, daughter and co-heiress of Sir *John Huband*, of *Ipsley* in the county of *Warwick*, Bart. by whom he had the following children: *Robert*, his only son, the second Earl of *Northington*, who was Lord Lieutenant of

(*a*) Mr. *Hardy*, in his *Life of Lord Charlemont*, Vol. II. p. 51. relates a very honourable instance of his kindness to Mr. *Pratt*, afterwards Lord Chancellor *Camden*; the truth of which, however, the Editor has no means of ascertaining.

Ireland during Lord *North's* coalition administration, and who died, without ever having been married, in 1787. And five daughters, 1st. *Bridget*, who married first the Honourable *Robert Lane*, eldest son of *George*, Lord *Bingley*, and secondly the Honourable *John Tollemache*, son of *Lionel*, Earl of *Dysart*, and who surviving her only son *Lionel Tollemache*, killed at the siege of *Valenciennes*, died without issue. 2d. *Jane*, married to Sir *Willoughby Aston*, Bart., and who died without issue. 3d. *Mary*, second wife of the Earl of *Ligonier*, and afterwards married to Viscount *Wentworth*, who also died without issue. 4th. *Catherine*, first wife of the present Earl of *Coventry*, who also died without issue. And 5th. *Elizabeth*, married Sir *Morton Eden*, K.B. (afterwards created Lord *Henley*,) who died on the 20th of *August*, 1821, and of whom the Editor of these volumes, having become the eldest surviving son, is the grandson, and now the heir at law of Lord Chancellor *Northington*.

LIST OF CASES.

VOL. I.

	Page		Page
A.			
ALEYN v. Belchier -	132	Burchell, King v. -	424
Ambler, Whitaker v. -	151	Burgess v. Wheate - -	177
Ash, Nash v. - -	378	Butler, Belchier v. -	523
Attorney-General v. Bradley	482	C.	
————— v. Tancred	10	Carpenter v. Heriot -	338
————— v. Wheate	177	Carwardine v. Carwardine -	27
Austen v. Taylor -	361	Cavendish, Lowther v. -	99
B.		Chandos, Duke of, Jalabert v.	372
Bartlett v. Pickersgill -	515	Cholmondeley v. Meyrick -	77
Battie, Moore v. - -	273	Clarke, Westley v. -	357
Bedford Level Company,		Clifton, Oxford University v.	473
Redshaw v. - -	346	Codrington, England v. -	169
Belchier, Aleyn v. - -	132	Collier, Spurgeon v. -	55
———— v. Butler -	523	Conyers, Wake v. -	331
Bennett, Sims v. - -	382	Cotton, Forrester v. -	532
Bickerston, Ryder v. -	149 n.	Cowper v. Elphinstone -	17
Blaauwpot v. Da Costa -	130	———— v. Scott - -	ib.
Boson v. Statham - -	508	———— v. Tuffnell - -	ib.
Bowes, Earl of Darlington v.	270	D.	
Bradley, Attorney-General v.	482	Da Costa, Blaauwpot v. -	130
Brander, Strachan v. -	303	Darlington, Earl of, v. Bowes	270
Brown v. Peck - -	140	Deem, Howorth v. -	351

	Page		Page
E		I.	
Edwards v. Pike - -	267	Ironside, Renforth v. -	523
Egremont, Earl of, Earl of Northumberland v. -	435	J.	
Elphinstone, Cowper v. -	17	Jacob, Ex parte - -	174
England v. Codrington -	169	Jalabert v. Duke of Chandos	372
		J'Anson, Pigott v. -	469
F.		K.	
Fanshaw v. Rotheram -	276	King v. Burchell - -	424
<i>Fenhoulet v. Passavant</i> 344 n.		L.	
Fisher v. Touchett -	158	Lambe, Earl of Salisbury v.	465
Forbes v. Phipps - -	502	Lawrence v. Maggs -	453
Forrester v. Cotton -	532	Lennard, Stanley v. -	87
Franks v. Martin - -	309	Lowther v. Cavendish -	99
G.		Lymington, Lord, Webb v.	8
Godolphin, Earl, Duke of Marlborough v. -	404	M.	
Gopp, Partridge v. -	163	Manaton v. Molesworth -	18
Granby, Marquis of, Earl of Northumberland v. -	489	Marlborough, Duke of, Earl Godolphin v. - -	404
Gray v. Shawne - -	153	Martin, Franks v. -	309
Gregory, Pelham v. -	518	Merry v. Ryves - -	1
Griffith v. Sheffield -	73	Meyrick, Cholmondeley v. -	77
Grimstead, Mills v. -	342	———, Reynolds v. -	48
H.		Mills v. Grimstead -	342
Harden v. Parsons -	145	———, Hatch v. - -	ib.
Hatch v. Mills - -	342	Molesworth, Manaton v. -	18
Heathcote, Stephenson v. -	38	———, Wortley v. -	ib.
Hennand v. Moore -	327	Moore v. Battie - -	273
Heriot, Carpenter v. -	339	———, Hennand v. -	327
Howorth v. Deem - -	351	——— v. Moore - -	ib.

LIST OF CASES.

xxxiii

	Page
Moore, - Vernon v. - -	327
Mordaunt, Earl of Peterborough v. - - -	474
N.	
Nash v. Ash - -	378
Newton, Earl of Salisbury v.	370
Northumberland, Earl of, v. Earl of Egremont -	435
_____ v. Marquis of Granby - -	489
O.	
Oakeley v. Smith - -	261
Oxford, University of, v. Clifton - - -	473
P.	
Parsons, Harden v. -	145
Partridge v. Gopp -	163
Passavant, Fenhoulet v.	344 n.
Pearson, Wright v. -	119
Peat v. Powell - -	479
Peck, Brown v. - -	140
Pelham v. Gregory -	518
Peterborough, Earl of, v. Mordaunt . - -	474
Phipps, Forbes v. - -	502
Pickering v. Towers -	142
Pickersgill, Bartlett v. -	515
Pigott v. J'Anson -	469
Pike, Edwards v. - -	267
Powell, Peat v. . - -	479

	Page
R.	
Redshaw v. Bedford Level Company - -	346
Renforth v. Ironside -	523
Reynolds v. Meyrick -	48
Rotheram, Fanshaw v. -	276
Ryder v. Bickerston -	149 n.
Ryves, Merry v. - -	1
S.	
Salisbury, Earl of, v. Lambe	465
_____ v. Newton	370
Salkeld v. Salkeld - -	64
_____ v. Vernon - -	ib.
Scott, Cowper v. - -	17
_____ v. Scott - -	458
Shawne, Gray v. - -	153
Sheffield, Griffith v. -	73
Sims v. Bennett - -	382
Smith, Oakeley v. - -	261
Spurgeon v. Collier -	55
Stanley v. Lennard - -	87
Statham, Boson v. -	508
Stephenson v. Heathcote -	38
Strachan v. Brander -	303
T.	
Tancred, Attorney-General v.	10
Taylor, Austen v. -	361
Touchett, Fisher v. -	158
Towers, Pickering v. -	142
Tuffnell, Cowper v. -	17

LIST OF CASES.

	Page		Page
V.		Webb v. Webb - -	8
Vernon v. Moore -	327	Westley v. Clarke -	357
——, Salkeld v. -	64	Wheate, Attorney-General v.	177
		——, Burgess v. -	<i>ib.</i>
W.		Whitaker v. Ambler -	151
Wake v. Conyers -	331	Wortley v. Molesworth -	18
Webb v. Lord Lymington -	8	Wright, Pearson v. -	119

LORD KEEPER.

SIR ROBERT HENLEY, created *March 27th*, 1760, **LORD HENLEY.**

MASTER OF THE ROLLS.

SIR THOMAS CLARKE.

ATTORNEY-GENERAL.

SIR CHARLES PRATT.

SOLICITOR-GENERAL.

THE HONOURABLE CHARLES YORKE.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Chancery.

On *Thursday* the 30th of *June*, 1757, the Lords Commissioners resigned the Great Seal to his Majesty, who immediately delivered it to Sir ROBERT HENLEY, *Attorney General*, with the title of Lord Keeper.

1904. 1 Ch. 120.

MERRY v. RYVES.

Et è contra.

(*Reg. Lib. Min. Trin.* 1757.)

1757.
14th & 15th
July.
S. C.
Core, MSS.

GEORGE RYVES, by indenture bearing date the 21st of *November*, 1708 (*a*), pursuant to a solemn promise made to his father to provide for his sisters, charged


(*a*) See *Berkeley v. Ryder*, 2 *Ves.* 523. (should be *Berkeley v. Ryves*, *Reg. Lib. A.* 1753, *fol* 361.) The plaintiff in that

cause had married another of the sisters, and the probability of this bill being filed is there alluded to.

Marriage held to have been with consent, where *A.*, whose consent was necessary, agreed to the marriage, provided a proper settlement could be made, and referred to *B.* to prepare

one, which was accordingly done; and though there was afterwards some altercation between *A.* and the proposed husband, who signified his intention of relinquishing his addresses, yet the consent having been obtained without misrepresentation, held that it could not be retracted: otherwise, if it had been obtained by deceit or fraud.

Interest refused upon a stale demand.

1757.

 MERRY
 v.
 RYVES.

certain estates with a term of 1000 years, the trusts whereof were declared to be to raise by sale or mortgage £1000 each for the sisters of the said *George Ryves* (of whom the plaintiff's mother was one), to be paid them respectively, at and upon their respective days of marriage, so as they respectively married with the consent of the said *George Ryves*, *Ann Ryves*, their mother, and *Thomas Heysham*, and the survivors or survivor of them; but in case any or either of them should marry without such consent, it was declared that she or they so marrying, should not receive such £1000, neither should any money be raised for or paid to her or them so marrying without consent.

The bill, in the former of these causes, was to have the sum of £1000 raised and paid to the plaintiff for the marriage-portion of his mother, with interest for the same from the time of her marriage with his father in 1721, which was charged in the bill to have been with such consent as required in the deed. The cross bill was for a discovery, and to be quieted in possession.

It appeared in evidence that *Anthony Merry*, the plaintiff's father, was a man of very considerable fortune, and had paid his addresses to Miss *Ryves*. In *June* 1721, he wrote to *George Ryves*, her brother, stating that he had been in his sister's company, and supposed he had gained her affections, and desires his consent as a father. *George Ryves*, in answer, stated, "that the proposal he made, though late, he should not oppose; that his character and circumstances were extraordinarily good; that he should leave the management of the settlement to Mr. *Brucer*, and that he would abide by Mr. *Brucer's* agreement on the settlement."

Brucer accordingly prepared the articles; the mother and trustee consented; the mother being a witness to the articles, whereby £3000 was settled. Before the mar-

riage some difference arising between Mr. *Merry* and the brother, the latter absolutely forbad the marriage; and it appeared that Mr. *Merry*, in a letter to the brother, gave up his addresses, and wished the lady a better husband. Some time after, however, without any further application to the brother, the marriage was had, and now, the plaintiff's father and mother being dead, and the plaintiff the only child of the marriage, the question was, whether he is entitled to have the £1000 raised and paid to him.

The Attorney-General, Mr. *Wilbraham*, and Mr. *de Grey*, for the plaintiff.

The case divides itself into two questions: first, whether it appears upon the evidence that any consent was given to the marriage by *George Ryves*, the plaintiff's uncle; and if so, then, secondly, whether such consent could afterwards be revoked.

The court, in all cases of this kind, favours marriage as much as possible, and does not consider the consent to be like an interest, but as a trust to guard against improvident marriages, and whoever has to execute it must use a parental discretion and tenderness. The court, therefore, will compel a consent in a reasonable case, and consider, in support of a portion so fettered, the grounds and reasons upon which the consent is refused. In many cases constructive consents have been held sufficient, and the court has said, where there was a privity to the engagement of the parties, that no dissent was a tacit consent, *Mesgrett v. Mesgrett* (a), *Farmer v. Compton* (b), *Peyton v. Bury* (c), *Daley v. Desbouverie* (d), and in a case cited in 1 *Mod.* 310, verbal consent was held good, though a consent in writing was required. In the pre-

1757.

 MERRY
 v.
 RYVES.

(a) 2 *Vern.* 580.

(c) 2 *P. Wms.* 626.

(b) 1 *Ch. Ca.* 1.

(d) 2 *Atk.* 261.

1757.
 MERRY
 v.
 RYVES.

sent case there was a plain constructive consent by the brother in referring the plaintiff's father to Mr. *Brucer*; and the marriage articles being made with Mr. *Brucer*'s approbation. The consent was given upon condition of Mr. *Merry*'s making a settlement; and, by Mr. *Merry*'s subsequent proceeding, that consent became absolute.

Secondly, It is a rule, that if the parties who are to consent, permit the courtship to go on, and the young persons to meet on the foot of a marriage, that this is a constructive consent; and having been instrumental in engaging their affections, they shall not afterwards be permitted to revoke it, or by a subsequent dissent to deprive the parties marrying of the portion. In the late case of Lord *Strange v. Smith (a)*, Lord *Hardwicke* held, that the mother having so encouraged the marriage, it amounted to a consent which she could not afterwards revoke. In the case of *Campbell v. Lord Netterville (b)*, in *Dom. Proc.* 1737, encouragement had been given by the father, who afterwards openly withdrew his consent; but still continued privy to the courtship, and never opposed. The *Court of Chancery* in *Ireland* thought it a good consent, and the *House of Lords* affirmed the decree.

As to interest, it is the invariable rule of this court to give interest from the time the right has vested. A legacy is always paid with interest from the end of the year after the testator's death, otherwise the court would be always inquiring whether the executors made interest.

The *Solicitor-General*, Mr. *Pechell*, and Sir *Anthony Abdy* for the defendants.

This is a case of great hardship. The portion, if ever due, is not claimed till thirty-six years after it has become so: no notice is given to the remainder-man of the claim, but he is suffered to spend the rents and profits. It

(a) *Amb.* 263.

(b) *Cit.* 2 *Ves.* 534.

is admitted, that the plaintiff must shew a final conclusive consent. In the case of the legacy, if there be no limitation over, it is only *in terrorem*; but where it is money to be laid out in land, it is a condition precedent, a qualification or description which must be complied with. Whether the consent in the present case was ever given or not, there is at least no doubt but that it was revoked. Mr. *Ryves* consents, but demands a settlement. Mr. *Merry* upon that relinquishes the union. The plaintiff, therefore, claiming under Mr. *Merry*, must shew a consent subsequent to that relinquishment, for he does not proceed upon the faith of the first treaty. It is said, that the consent being given, it is not revocable. It would be very impolitic to make it irrevocable. A thousand new views, in which the intended husband's character might appear, would justify such a revocation. Mr. *Merry*, in refusing to make a settlement, evinced such a perverseness of disposition as fully justified Mr. *Ryves* in withdrawing his consent.

1757.

MERRY
v.
RYVES.

The Lord KEEPER.

In order to decree according to the prayer of this bill, Mrs. *Merry* must be brought within the condition for raising the portion, and I am of opinion that she is so. The court has always, in cases of this nature, considered the question of consent with great latitude, adhering to the spirit and not the letter. The maxim, *qui tacet satis loquitur*, has therefore been respected, and constructive consents have been looked upon as entitled to as much regard as if conveyed in express terms. Even upon penal statutes, where consent to an act constitutes the crime, it has been held not to be necessary to prove that it was actually given; but what amounts to it has always been considered sufficient. For this reason, and upon

1757.
 ~~~~~  
 MERRY  
 v.  
 RYVES.

the authority of the cases of *Mesgrett v. Mesgrett*, and the others which have been cited at the bar, I must consider what appears to have been done by Mr. *George Ryves* as a consent given by him to Mr. *Merry's* marriage.


The question then will be, whether such consent could be afterwards retracted; and I am of opinion that it could not, though I think that it might have been if it had been obtained through any deceit or fraud; but nothing of that kind appears, or is even imputed in the present case. Here is no *suppressio veri*, or *suggestio falsi*, or any misrepresentation whatsoever. A plain constructive consent is given on a settlement being made, and this is referred to Mr. *Brucer*; and though there was afterwards some altercation about the settlement, yet a reasonable one is made. Here is £3000 settled for her £1000, and the whole is done with the approbation of Mr. *Brucer*, which makes the consent pure *ab initio*. Besides, a wise man, or at least one whose wisdom I can measure, might in such a case as this, where there appears to have been a great superiority of fortune on the side of the proposed husband, see reason not to require any settlement at all, or to accept of such as might be offered.

It must be taken therefore that here there was a consent; and this consent being pure *ab initio*, not obtained by any fraud or misrepresentation, I am of opinion that it could not be retracted. It would otherwise be a most cruel thing to suffer young persons to contract and entertain affection, and then *ad libitum* withdraw the consent. The present case is in this respect like the case of Lord *Strange*, who made his addresses to Miss *Smith*, in which he was encouraged by her mother, but her consent not being made necessary in writing, this encouragement of the courtship was held by Lord *Hardwicke* as sufficient.



to dispense with the condition, and amounted to a consent which she could not revoke (*a*).

I must therefore declare that the plaintiff is entitled to have this £1000 raised with interest. I shall however decree interest no further back than from the time of filing the bill, which is the 9th of *August* 1754. It has been argued, that interest ought to be paid as for the detention of a debt from the time the right accrued by the marriage of Mrs. *Merry*, in 1721. But I know of no rule that interest is to be paid *pro detentione debiti*, but under circumstances which are under the sound discretion of the court to judge of: and if persons having rights, especially in such a case as this, will lie by for such a length of time without making any demand, they ought to suffer for it. To decree otherwise might undo families, who by such long acquiescence have reason to think themselves discharged from such stale demands (*b*).

1757.  
  
 MERRY  
 v.  
 RYVES.

(*a*) The same principles as to consent to marriage, and the right of retracting it, have been recognized and adopted, in *O'Callaghan v. Cooper*, 5 *Ves.* 117. *Dashwood v. Lord Bulkeley*, 10 *Ves.* 230. *D'Aguilar v. Drinkwater*, 2 *Ves. & Be.* 225. *Clarke v. Parker*, 19 *Ves.* 1. *Pollock v. Croft*, 1 *Meriv.* 181. *Garret v. Pritty*, (reported 2 *Vern.* 293.) corrected and extracted from the Register's Book, 3 *Meriv.* 119.

*Vide* also the Editor's note to *Scott v. Tyler*, 2 *Bro. C. C.* 488, and *Long v. Ricketts*, 2 *S. & S.* 179. *Smith v. Cowdery*, *ib.* 358.

(*b*) Interest upon a portion refused on similar grounds. *Barrington v. O'Brien*, 1 *Ba. & Be.* 173.—As to the general doctrine respecting interest, *vide* the Editor's note to *Creuze v. Lowth*, 4 *Bro. C. C.* 316.

1757.  
3d August.  
*Cit. 8 Ves. 323.*

WEBB v. LORD LYMINGTON.

WEBB v. WEBB.

*Et è contra.*

(*Reg. Lib. Min. Trin. 1757.*)

Title-deeds delivered out of court to tenant for life, except when brought into court under an order for safe custody.

LIEUTENANT-GENERAL *Webb* by his will, bearing date the 13th of *December*, 1723, devised his real estates to his son *Borlase Richmond Webb* for life, remainder to his first and other sons, remainder to his son *John Richmond Webb* for life, remainder to his first and other sons, remainder to his daughters as tenants in common: and he gave £2000 to each of his younger children as portions.

The younger children brought bills for an account of the personal estate, and sale of a sufficient part of the real estates for payment of their portions, which had been directed by several decrees made in these causes. *Borlase Richmond Webb*, the tenant for life, had for this purpose left all the title-deeds and writings belonging to the estate with the Master. The accounts having been taken, and a sufficient part of the real estate sold, the portions of the younger children were paid off. *Borlase Richmond Webb* being dead, *John Richmond Webb*, the present tenant for life (*a*), on the 16th of *June* last, obtained an order that the said deeds and writings, belonging to the estates that remained unsold, in the custody of the Master, should be delivered to the plaintiff, *John Richmond Webb*.

Mr. *Wilbraham*, on behalf of the sisters, now moved to

(*a*) *Reg. Lib. B. 1756. f. 502.*

discharge that order, and that the deeds might be kept in court for safe custody.

The *Attorney-General* and Mr. Jones for the plaintiff.

*The Lord KEEPER*

Refused the motion; observing that it was his opinion, that the tenant for life should have the possession of the deeds, except when brought into court, under an order of court, for safe custody (a).

(a) Applications by tenant for life to have title-deeds delivered out of court granted. *Duncombe v. Mayer*, 8 Ves. 320. *Churchill v. Small*, and *Knott v. Wise*, cit. ib.—In *Hicks v. Hicks*, 2 Dick. 650, Lord Kenyon is reported to have refused a similar application, but the account of that case is probably incorrect, as no order is to be found in the registrar's book, and it is said, 1 Ves. Jun. 77, that it stood over to look into the cases.

*Primâ facie*, a person in possession of an estate under a title that gives a freehold interest at the least, has a right to the custody of title-deeds. *Ford v. Peering*, 1 Ves. Jun. 72. *Strode v. Blackburne*, 3 Ves. 225. *Bowles v. Stewart*, 1 S. & L. 209.

But there are many cases in which the court has directed deeds to be deposited for the benefit of a remainder-man, whose interest was expectant on a mere estate for life. *Joy v. Joy*, 2 Eq. Ab. 284. *Ivie v. Ivie*, 1 Atk. 431. *Smith v. Cooke*, 3 Atk. 382. *Lord Lempster v. Lord Pomfret*, Amb. 154. *Southby v. Stonehouse*, 2 Ves. 612. *Ford v. Peering*, sup.—So also in the case of a jointress, provided the party confirm her jointure. *Senhouse v. Earl*, 2 Ves. 430. *Leach v. Trollope*, ib. 662. *Petre v. Petre*, 3 Atk. 511.—But it seems that a bill will not lie by a purchaser from a contingent remainder-man, for inspection of title-deeds in the hands of a tenant for life. *Noel v. Ward*, 1 Mad. Rep. 322.

1757.

WEBB v. Lord LYMINGTON.

WEBB v. WEBB.

1757.  
13th and 18th  
of July.  
8th of Nov.  
S. C.  
1 *Bl. Rep.* 90.  
*Ambl.* 354.

## THE ATTORNEY-GENERAL v. TANCRED.

(*Reg. Lib. A.* 1757, fol. 73.)

Conveyance to charitable uses, defective on account of the uses being limited to certain officers of a corporation, and not to the corporate body, aided under 43 *Eliz. c. 4.*

Devise of lands to "the thirteen fellows of *Christ's*, and the fellows of *Gonville* and *Caius*, living at the testator's death", is a devise for the benefit of the whole body corporate, not of the particular fellows in their natural capacities, and valid under the exception in the statute of mortmain.

*CHRISTOPHER TANCRED*, esq. by indentures of lease and release, bearing date the 1st and 2d of *June*, 1721, in consideration of natural love to his mansion, and to preserve his estate at *Wixley* entire, conveyed the same to himself for life, remainder to his first and other sons in tail male, remainder to the use of the masters of *Christ* and *Caius Colleges*, the president of the *College of Physicians*, the treasurer of *Lincoln's Inn*, the master of the *Charter-House*, and the governors of *Chelsea* and *Greenwich Hospitals*, and their successors, upon trust only, to pay, half-yearly, £50 each to twelve persons of sixteen or more, natural born subjects of *Great Britain*, of the religion of the Church of *England*, of such low abilities as were not able to educate themselves, four of which to be educated in the study of divinity at *Christ's*, four in physic at *Gonville* and *Caius*, and four in the study of the common law, at *Lincoln's Inn*: to be paid them until they shall have attained their respective degrees of Bachelor of Arts, Bachelor of Physic, and Barrister at Law, and three years after such degrees, and no longer, and to be called *Tancred's* students. He then directed his trustees, out of the rents and profits of the estate, to pay £20 each, half-yearly, to twelve decayed and necessitated gentlemen clergymen, commissioned officers of the land or sea service, of fifty years, or more, when admitted natural born subjects of *Great Britain*, who are to reside in the mansion-house at *Wixley*: to be called


*Tancred's Hospital*, and *Tancred's Pensioners*. He likewise gave £10 to the master, and £5 *per ann.* to each of the thirteen fellows of *Christ's*, as an augmentation of their present revenues.

By his will, bearing date the 20th of *May*, 1746, he gave to his sisters one shilling each out of all his real and personal estate, and then devised all his estate at *Green Hamerton*, *Minskip*, and *Aldbrough*, and elsewhere, in *Great Britain*, except his house at *Newmarket*, to the same trustees, to pay annually, in equal proportions, to the twelve students and twelve pensioners, all the yearly rents and profits of the premises: provided that, in case the act of mortmain should prevent this disposition, then to the thirteen fellows of *Christ's*, and the fellows of *Gonville* and *Caius*, and the scholars of both the said colleges living at his death, each fellow to have a double proportion to each scholar. He then devised the house at *Newmarket* to the master and fellows of *Christ's*, in trust, that they and their successors should apply the yearly rents for some under-graduate student.

This was an information and bill to establish and carry into execution the deed and will.

The *Attorney-General*, the *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Comyn*, in support of the information; Mr. *de Grey* and Mr. *Wilson* for the college.

All the estates must go to the charities appointed to, which are humane and prudent, with moderate and reasonable stipends for the purposes of education and refuge to those who had been in the service of their country. There is, however, one legal objection to the deed. It is said that the deed cannot operate, the persons not being *capaces*, not being incorporated, and without successors, it being limited to them in their natural capacity. But though such a deed may be invalid at law, yet it is quite

1757.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 TANCRED.

1757.

~  
The  
ATTORNEY-  
GENERAL  
v.  
TANCRED.

clear from many cases that it may be made good by the statute of *Elisabeth*. The cases are very numerous to shew that any informality in the description of the persons intended to take, will be aided by this court, *Plowd.* 523. 2 *Vent.* 349. *Hob.* 183. *Co. Lit.* 9 b. *Duke's Charitable Uses*, 77. 80, 81. 83. 141. *Tothil*, 93. 4 *Lev.* 190. So in *Dr. Bentley's* case, the words *Visitor sit Episcopus Eliensis* were held sufficient to constitute the bishop and his successors visitors. *Str.* 912.

As to the will, the limitation to the law students and the twelve pensioners is void, but the limitation over, which was inserted in order to secure the disinherison of his heirs, must take effect. It is contended, on the other side, that this devise over is void, as being to them in their natural capacity. The intention speaks against that. The testator had no knowledge of or kindness for them in their natural capacity. He merely wanted to establish a perpetuity of his name and estate. In the deed he has noticed the master and fellows with donations in succession: the will still calls them by the name of fellows. A devise to a dean and chapter, and their heirs, is good, and will carry it to their successors, because the intention is apparent that the gift was to them in their corporate capacity; as in the case of a gift of *frankalmoigne*, a fee-simple passeth, though it be the case of a sole corporation, without this word (successors). *Co. Lit.* 94 b. It is the intent to give a perpetuity which carries the fee. These words would be a good limitation of a fee in grant. Besides, this is in the nature of substitution; it is a limitation over, by way of substitution of what he had before given in fee.

The objection that the exception in the statute of mortmain only extends to devises to the general use of the universities and colleges, but not to the particular

members of either the universities, or the college, is unfounded. Such a construction would take away from the efficacy of the clause, and be repugnant to the intention of the legislature, which was to favour the universities and principal schools. The clause is very general in its terms, and indeed so much so as to be very inaccurately penned, for, if you take it literally, it may be entirely evaded; you may devise to a college, and declare the trust to uses prohibited.


Mr. *Sewell* and Mr. *Capper* for the master and fellows, as executors claiming in their natural capacity, contended that the exception in the statute of mortmain included particular members as well as colleges.

Mr. *Willes* and Mr. *Perrot* for the heirs at law.

The statute of *Elizabeth* was not intended to supply defective conveyances, and therefore cannot be of any service in the present case. *Montague's case*, *Duke*, 78. *Tothil*, 96. From the revolution to the present case there has been none so strong as this; but the instances are very numerous where the court has refused to make that good for a charity which would be void in the case of an individual. *Attorney-General v. Bains*, Prec. Case, 270. *Jenner v. Harper*, 1 *P. Wms.* 247. Prec. Case, 389. 1 *Salk.* 163. *Gilb. Chan.* 340. *Attorney-General v. Gill*, 2 *P. Wms.* 369. As to the question upon the will, Lord *Hardwicke*, in the late cases upon the mortmain act, declared, that he would not construe it with the same chicane as had been used in respect of the old statutes, *Attorney-General v. Greaves* (a), *Attorney-General v. Lord Gower* (b). When an act of parliament restrains a natural right, it should indeed be construed as strictly as possible; but these wills are in violation of common utility, and the private happiness of families. Every disposition ought to be restrained, but those which are actually excepted.

(a) *Amb.* 155.

(b) 9 *Mod.* 224. 226.

1757.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 TANCRED.

1757.

*The*  
ATTORNEY-  
GENERAL  
v.  
TANCRED.

Is the present an excepted case? The words of the proviso are "to, or in trust for, either of the two universities, or any of the colleges, or houses of learning within either of the said two universities." The devise to the thirteen fellows cannot come within these words, which are peculiarly general in their extent: it is a devise to them in their natural capacity, and cannot have the benefit of the proviso.

8th of Nov.

*The Lord KEEPER.*

The conveyance of the 2d of *June*, 1721, is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body, and therefore there is a want of persons to take in perpetual succession. The only doubt is, whether the court should supply this defect for the benefit of the charity under the statute of *Elizabeth*. And I take the uniform rule of this court before, at, and after the statute of *Elizabeth*, to have been that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute of *Hen. 8.*, yet they were always considered as good in equity, if given to charitable uses. There is here no doubt of Mr. *Tancred's* power to convey, and the uses are truly charitable, and very proper in themselves; the education of poor scholars in the university, of students at the inns of court, and the maintenance of poor pensioners in his own house. However unbecomingly, therefore, Mr. *Tancred* may have expressed himself in his will, with respect to his relations, (and indeed he seems to have cast off all natural affection,) and however reluctant I may be to establish a disposition made under this turn of mind, yet, sitting here judicially, I am obliged, by the uniform course of precedents, to assist this conveyance,



and, more especially, because it is the peculiar province of a court of equity to protect men in the freedom of disposing of their property, which is a point of the utmost importance in a trading country.

This conveyance, therefore, being established under the statute of *Elizabeth*, we are next to consider how it is affected by stat. 9 *Geo.* 2. Mr. *Tancred*, by his will, makes a disposition by way of substitution : in case the dispositions are within the statutes of mortmain, then to the fellows, &c. of the two colleges. The relators admit that part of the disposition is void with regard to the pensioners and law students, but then they contend that the substitution must take place by reason of the exception of the universities and their colleges in the statute. The defendants contend that all is void, as well the substitution as the original uses, because the devise is not to the body corporate, but only to the particular fellows in their personal capacity. No cases have been cited on either side : we must therefore form an original construction of this clause in the statute of Mortmain ; and my opinion is, first, that this is a devise for the benefit of the whole body corporate ; secondly, had it not been so, I should still have thought that the legislature intended, by the exception in the statute, to save a devise for the benefit of particular members, as well as of the whole body.

The legislature meant to except such devises as were really and *bonâ fide* for the benefit of colleges, not those in which the legal interest only passes to the college in trust for other charitable uses, for then the statutes of mortmain might be defeated every day (*a*). And this devise is for the benefit of the whole society, even of the master himself, who must pass through a fellowship, and

(*a*) Vid. *Attorney-General v. Munby*, 1 *Meriv.* 327.

1757.

The  
ATTORNEY-  
GENERAL  
v.  
TANCRED.

The legislature intended by the exception in the statute of Mortmain, to save devises for the benefit of particular members as well as of the whole body.

The legislature intended to except such devises as were really and *bonâ fide* for the benefit of colleges, not those where the legal interest only passes to the college in trust for other charitable uses.

1757.

**The  
ATTORNEY-  
GENERAL  
v.  
TANCRED.**

The exception only extends to colleges established at the time when the statute of mortmain was enacted.

partake of Mr. *Tancred's* bounty in his progress towards the headship. Besides, we all know, that in these houses of education, any encouragement for youth to enter into a particular college, is a general benefit and profit to the whole society. The legislature has thrown no restraint on these gifts when made to the body corporate of either university, or to colleges already established there (a). They judged that leaving this path open would not, for some time, be liable to much inconvenience; but when they saw an inconvenience, they restrained even gifts to colleges. Thus livings are only grantable to these bodies until they amount in number to a moiety of the fellows, lest, if the succession be rendered too rapid, there should not be persons left of sufficient age, temper, and discretion, to govern the society, and answer the great purposes of the foundation.

This devise to the fellows and scholars contains no circumstances that intimate any intent to give them the estate in their personal capacities. It is clearly to them as members of the body corporate, for a perpetual augmentation of the revenue of themselves and successors.

(a) This distinction was the *Attorney-General v. Bowdoubted* by Lord *Rosslyn* in *yer*, 3 *Ves.* 728.

COWPER v. SCOTT.

COWPER v. ELPHINSTONE.

COWPER v. TUFNELL.

(*Reg. Lib. A. 1757. fol. 37.*)

1757.  
November 19,  
S. C.  
Sew. MSS.  
1 Bro. C. C. 141.

THIS was a petition presented by *Fawcett*, a defendant in the three suits, for a rehearing, after a decree made in these causes bearing date the 30th of *October*, 1753; and costs being the only matter in dispute, it was objected by *Wilbraham* and *de Grey*, for the plaintiff, that there could not be a rehearing for costs only.

The *Attorney-General*, Mr. *Willes*, and Mr. *Capper*, in support of the petition.

There is a difference where there is a decree for costs charged on the person (for there the general rule is that there can be no re-hearing for costs only), and where the costs are directed to come out of the estate. In (a) *Owen v. Griffith*, the only ground of appeal was that the defendant was ordered to pay costs; and two questions were made on the hearing, first, whether the rule is so general that a party can in no case appeal for costs; and secondly, whether, as the defendant was an incumbrancer, the estate was not as much liable to pay the costs as the debt. The *Lord Chancellor* declared, that the rule was not so general with respect to parties appealing for costs only. That in particular cases such rule might and had been dispensed with; and his Lordship, thinking that it might be dispensed with in that case, reversed so much of the decree as related to costs.

An appeal or rehearing for costs only, allowed under particular circumstances.

An original and two supplemental bills considered but as one cause, and therefore but one deposit necessary.

(a) 1 *Ves.* 250. *Amb.* 520.

1757.

COWPER

v.

SCOTT.

COWPER

v.

ELPHINSTONE.

COWPER

v.

TURNELL.

*The Lord KEEPER.*

An appeal or rehearing for costs only, is not to be encouraged, because costs are merely discretionary, and depending upon particular circumstances; and when a judge has once determined the matter, a rehearing for costs should be admitted with great caution. But upon the authority of the case of *Owen v. Griffith*, I think it may be done under particular circumstances (a).

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Upon the merits *The Lord Keeper* affirmed the former decree.

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A question arose in these causes, there being an original, and two supplemental bills, whether there should be only one or more deposits.

*The Lord KEEPER.*

I can only consider the three causes as one cause, consisting of different branches, and that there ought to be but one deposit.

(a) A similar application 594, and in *Williams v. Beg-*  
was refused in *Wirdman v. non*, in *Scac.* 27 Jan. 1792.  
*Kent*, 1 Bro. C. C. 140. *Dick.* *cit.* *Dick.* 595.

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1757.  
6th, 7th, 9th, &  
10th Dec.

MANATON v. MOLESWORTH.  
WORTLEY v. MOLESWORTH.

(Reg. Lib. B. 1757, fol. 182.)

Sale declared to  
be made subject  
to the trusts of  
testator's will,  
where under a

decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life.

Allowance of a debt in the Master's report, which had been obtained by fraud, rectified, the proper mode of proceeding being by original bill, not by bill of review; and held that it was not necessary to pray specifically that the act of the court should be set aside, plaintiff having made a sufficient case to obtain that relief under the prayer for general relief.

HENRY MANATON by his will, bearing date the 13th of January, 1713, devised his lands in *Cornwall, Devonshire, and Somerset*, to his cousin *Francis Manaton* for

life; remainder to *Ambrose Manaton*, his eldest son, for life, with remainder to his first and other sons in tail male; remainder to *Sampson Manaton*, his second son, in like manner; remainder to *Robert Manaton* (the father of the plaintiff), for life, with remainder to his first and other sons in tail male; remainder to testator's right heirs. He then subjected his estate to the payment of his debts, and appointed *Francis Manaton* his executor and residuary legatee.

The testator having died in 1716 considerably indebted, a bill was filed by Sir *Nicholas Morrice* and other creditors for a sale; and a decree was made by consent, on the 14th of *July*, 1720, that the personal estate should be applied to the simple contract debts only, and that the real estate should be sold to pay specialty debts, and the residue settled according to the trusts of the will.

The Master made his report, bearing date the 21st of *July*, 1729. All the claims upon the estate of the testator had been satisfied, except those of *Francis*, who claimed to be entitled to £4100, as due to him from the testator's estate. Part of this sum consisted of simple contract debts of the testator's, which had been paid off by him as executor, and the other part of the sum of £1313 11s. 1d. being the amount of two bonds (with interest upon them), which had been formerly given by the testator. These two bonds had in fact been paid off by the testator during his lifetime, and had been returned to him, but having been omitted to be cancelled, they were found by *Francis* among the testator's papers at his death, and set up fraudulently by him in the Master's office, and allowed.

*Francis*, being indebted to the defendant *Wortley*, executed an assignment to him of the debts due to him from the estate of the testator. *Francis* and *Sampson* were also indebted to Sir *William Morrice* upon their

1757.  
MANATON  
v.  
MOLESWORTH.  
WORTLEY  
v.  
MOLESWORTH.

1757.

MANATON

v.

MOLESWORTH.

WORTLEY

• v.

MOLESWORTH.

joint bond, who was likewise a creditor upon the estate of the testator to the amount of £1383.

Before any account had been taken in the master's office, upon the representations of *Francis* of the extreme inadequacy of the personal estate to pay the debts of the testator, the real estate was set up to sale. *William Mohun* was the highest bidder, at the sum of £6500. He was however afterwards discharged from his purchase upon consent, and Sir *William Morrice* declared the highest bidder, nominally at the same sum, but it was agreed between the parties, that he should purchase at an undervalue, and thereby satisfy himself for what was due to him, both from the estate of the testator, and from *Francis* and *Sampson*; and that with the remainder he should pay Mr. *Wortley*. In pursuance of this agreement, he executed a declaration of trust, bearing date the 9th of *June*, 1732, that his name was used in trust for *Francis* and *Sampson*, in order the better to sell, and with the money in the first place to pay himself, and then to pay the overplus to Mr. *Wortley*, in discharge of the debts due to him. A conveyance of the estate, bearing date the 2d of *September*, 1732, was accordingly made, in which *Robert*, the son, who was first tenant in tail under the will, joined.

In 1748, all the intermediate remainder-men being dead, the plaintiff became entitled as tenant in tail, under the will. He now filed the bill in the former suit against Sir *John Molesworth* and the other representatives of Sir *William Morrice*, and also against Mr. *Wortley*, for an account, and that the surplus of the money arising by sale of the real estate, after payment of the testator's debts, might be laid out in land, and settled according to the trusts of the will, and to have the misallowance in the Master's report rectified.—The other bill was brought by Mr. *Wortley*, and prayed that the declaration

of trust of the 9th of *June*, 1732, might be carried into execution.

The *Attorney-General*, Mr. *Perrot*, Mr. *Jones*, and Mr. *Simpson*, for the plaintiff, *Henry Manaton*.

There are two questions, first, who is entitled to the surplus of the money raised by the sale of the real estate; for it is quite clear that Sir *William* is in the nature of a trustee for some one, and not a purchaser *bonâ fide*. The sale was a contrivance to charge the plaintiff's estate with *Francis Manaton's* debts. The tenant in tail being a party to the conveyance, does not make it the less a fraud, nor could the intervention of the court purge it: the intent to sell it at an undervalue to pay off *Francis's* and *Sampson's* debts, was concealed and suppressed. Nor is it any sufficient answer, that the sale was before the master, and that bidders might have come in, for they must have applied to the tenants in possession for an account of the nature and condition of the estate.

The second question is, whether the plaintiff can in this suit have the sum of £1313, unduly allowed in the Master's report, rectified: that allowance is charged to have been fraudulently procured. The court may more easily set that aside on an original bill, than on a bill of review: which only lies for matters unknown to the parties at the time of the hearing; but this was a subject which *Francis Manaton* was aware of. *Lloyd v. Mansel*, 2 *P. Williams*, 73. *Richmond v. Tayleur*, 1 *P. Williams*, 734. The plaintiff has made out a sufficient case to have the relief granted under the prayer for general relief: it is suitable to his case, and not inconsistent with the particular relief prayed.

The *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Capper*, for Mr. *Wortley*; Mr. *Willes* and Mr. *Comyn* for the representatives of Sir *William Morrice*.

The sale itself was entirely *bonâ fide*. There were:

1757.

MANATON

v.

MOLESWORTH.

WORTLEY

v.

MOLESWORTH.

1757.

MANATON

v.

MOLESWORTH.

WORTLEY

v.

MOLESWORTH.

large debts, and many creditors, and a sale ordered. There is no pretence to affect the first purchaser, and indeed if he had colluded with the parties, it would not have been for their interest that he should have been discharged; however, he is so, and Sir *William* stands in his place. As to the agreement between the parties, a creditor has a right to purchase, for his own benefit, and dispose of his purchase as he pleases. The agreement must be taken liberally, not literally: it was subsequent to the allowance of the sale: it was a trust for Sir *William* and Mr. *Wortley*, not for *Francis* and *Sampson*. As to the second question, there are two objections to the mode in which the relief is prayed. It ought to have been by bill of review. This is new matter since discovered, and therefore comes under Lord *Bacon's* rules. If an original bill be brought, it must be in a case of fraud, where all the parties collude: here it was a fraud of one of the creditors only. The other objection is, that even if the relief could be obtained by original bill, it is not prayed. The court is very tender of setting aside its own judgments, and cannot do so unless it be specifically prayed.

*The Lord KEEPER.*

Dec. 10.

This bill is brought by *Henry Manaton*, a remainderman, under the will of *Henry Manaton* the testator, to have an account of money raised by sale of part of the testator's real estate, and the residue to be settled according to the will of the testator, and to have a misallowance in the Master's account rectified. The relief prayed is clear by intuition: it is written in capitals; and the weakest eyes may discern it. The only laboured objection to it is, that the plaintiff is barred of justice by the acts of a court of equity; an objection that ought to be well examined before it is allowed.


The case, in short, seems to be this. In the year 1724 a decree was obtained by Sir *William Morrice*, on behalf



of himself and other creditors of *Henry Manaton*, for a sale of a sufficient part of this estate. At that time the interest in the estate stood thus. *Francis* had the first estate for life; *Sampson*, his son, the second estate for life; and *Robert*, the son of *Sampson*, an estate tail vested: the plaintiff had a remote contingent remainder, and was an infant. What was the justice to be done the several remainders? To have had an account taken of the testator's personal estate and of the debts, and an appropriation of the personal estate accordingly, and only so much of the real estate sold as would make good the deficiency of the personal estate. What was done? Before any account is taken, part of the real estate is put up to sale, on the importunity and representation of *Francis Manaton* that the debts were greater than they really were. One purchaser bids £6500; he is discharged on the application of *Sir William Morrice*, who becomes the next purchaser, with the consent of the tenant for life in possession; and *Sir William*, at the next bidding, is reported the best purchaser for the same sum.

Upon this transaction the question arises, and the present bill is founded.

The questions are by the counsel properly made two: First, Is *Sir William Morrice* a purchaser *bonâ fide*, or a trustee, and for whom? Secondly, Can relief be had on the misallowance in this bill? First, Both the bills charge *Sir William* as a trustee: it is admitted by the answer and the agreement, and the only question is, for whom? That must depend upon the circumstances and proofs attending the transaction. *Sir William Morrice* was a creditor on *Henry Manaton's* estate, and on *Francis* and *Sampson*. *Mr. Wortley* was a creditor of *Francis* and *Sampson*, and (by assignment of *Francis's* claims) on *Henry Manaton's* estate. *Sir William Morrice* had no inclination to become a purchaser of this estate for his own benefit or advantage. Neither he nor *Mr. Wortley* had

1757.  
  
 MANATON  
 v.  
 MOLESWORTH.  
 WORTLEY  
 v.  
 MOLESWORTH.

1757.

MANATON

v.

MOLESWORTH.

WORTLEY

v.

MOLESWORTH.

any occasion to buy it to secure their debts either from *Henry Manaton* or *Francis*, as far as *Francis* was a creditor on *Henry's* estate; for *Henry's* estate was an ample fund for his debts. Whence then arises this transaction of the purchase, which *Sir William* had neither inclination nor occasion to make? From a desire to get out of *Henry Manaton's* estate a fund to pay the debts of *Francis* and *Sampson*.

*Sir William Morrice*, who was to prosecute the decree; *Mr. Wortley*, who was a creditor of *Francis*, the tenant for life; *Francis* and *Sampson* (debtors to them both; and who, if they had been disinterested, were to have seen the most made of the estate) all agree that the estate shall be sold at an under value, and that *Sir William* shall purchase it for £6500. Out of the produce of an agreed second sale, *Sir William* is to pay himself whatever was due from *Henry*, *Francis*, and *Sampson* to him; and then he is to pay *Mr. Wortley* what is due to him from *Francis*: so that by this agreement a combined purchase was made under the decree, to defeat the justice of the decree, and to pay *Francis* and *Sampson's* debts out of the settled estate, not only contrary to the decree, but to obvious justice.

But it is said *Sir William* was a trustee for *Mr. Wortley*, and not accountable to the estate of *Henry Manaton*; that his purchase was fair, according to the usual course of the court, and that he might declare himself a trustee for whom he pleased.

That is, the party prosecuting a decree for sale, the tenant for life, and the principal creditor, may agree to sell the estate at a sum certain, acknowledged by them to be under the value, and that the real produce shall be applied, as far as it exceeds the sum agreed for, in payment of the debts of the tenant for life. And, secondly, that the purchaser shall by his act and deed, knowing the decree to be for a sale to pay the debts of the testator, take

the estate to perform the decree *pro tanto*, and as to the residue create a new trust.


I state what is in fact contended for. I will not countenance such manifest injustice so far as to comment on it or answer it. I cannot hesitate a moment to declare my opinion, that in case all the proceedings are to stand, Sir *William Morrice* is a trustee for the trusts in the will of the testator.

As to the second point, the relief on the misallowance of the two bonds to *Francis* in the account.

*Francis*, the first tenant for life, was the executor of the testator: he insists and is admitted by the report to be a large creditor of the testator's by specialty, which claim he assigns to Mr. *Wortley* as collateral security for a just debt. The debt reported due to him is made up of two bonds, amounting, principal and interest, to £1313 11s. 1d., which bonds had been discharged by the testator and delivered up, and which came again to the hands of *Francis* uncanceled, on his becoming the representative of the testator; so that they were allowed in the Master's report, by *Francis*'s suppression of truth, his breach of trust as an executor, his fraud and perjury, for he had sworn to his claim. The accounts by which these bonds were paid, and recognized to be so by *Francis*, under his hand, will not bear comment.

The bill prays to have this fraud rectified as against *Francis* and those claiming under him.

The objection to this relief is, that the plaintiff must bring a bill of review on matter existing before, and discovered since the hearing. But I am of opinion that method would not have been his proper method: this is

1757.  
  
 MANATON  
 v.  
 MOLESWORTH.  
 WORTLEY  
 v.  
 MOLESWORTH.

A bill of review, with matter come to the party's knowledge since the hearing, lies

where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court. For if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill.

1757.

MANATON

v.

MOLESWORTH.

WORTLEY

v.

MOLESWORTH.

not a case to which that remedy is applicable. A bill of review, with matter come to the party's knowledge after the hearing, lies where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court. For if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill (*a*).

The next objection is, if relief could be obtained by original bill, it can only be by bill expressly praying that the decree or act of the court may be set aside.

But I think this is considering the justice of the case in too narrow a compass, and introducing here the rigour of special pleadings.

To express the extent of the prayer for general relief, I have often heard it said figuratively that it is the next best prayer after the Lord's Prayer (*b*), and that under it you may obtain any relief the case made on the pleadings and proofs will warrant.

The plaintiff charges that *Francis Manaton* by fraud set up two debts, one for £529 by bond, besides interest to the amount of £325; the other for £337, besides interest to the amount of £122; and procured the same on the 21st of *July*, 1729, to be reported due to him. He

(*a*) Vid. *Kennedy v. Daly*,  
1 *Sch. & Lef.* 355.

(*b*) This foolish expression is attributed to Mr. *Robins* (by mistake called *Dobbins*, 3 *Atk.* 131) an eminent counsel, 2 *Atk.* 3. As to the extent and efficacy of the

prayer for general relief, vid. *Grimes v. French*, 2 *Atk.* 141.

*Beaumont v. Boulton*, 5 *Ves.* 485. *Palk v. Lord Clinton*, 12 *Ves.* 48. *Hiern v. Mill*, 13 *Ves.* 114. *Soden v. Soden*, cit. *ib.* & *Redes, Tr. Pl. Ch.* 39.

prays to have that misallowance rectified in the account, which he can only have by opening the report. The fraud of the claim, and procuring the report, are put in issue and proved; the court, *ex debito justitiæ*, must give \*him relief. He could not have pleaded the report; his representatives knew so, and never attempted it.

Suppose a bill brought to have a false item rectified in a common account which had been before paid, and that the plaintiff alleged in the same bill that he had given a general release, and only prayed to have this imposition rectified, and that there was no specific prayer to set aside the release, only general relief; would not the setting aside the release be consequential to the case made and relief prayed?

Therefore I think the plaintiff is entitled to this relief too. The cases mentioned of *Richmond v. Tayleur* and *Lloyd v. Mansell* fortify my opinion. I must therefore decree the purchase made subject to the trusts of the will, and so much of the report as concerns the claim and demand of *Francis Manaton* was obtained by fraud and ought to be set aside, &c. (a)

(a) Vide also *Gifford v. Hort*, 1 Sch. & Lef. 386. *Gore v. Stackpoole*, 1 Dow. P. C. 18. which establish, with this case, that a purchaser shall not be protected if a decree be obtained by fraud. But that he shall not lose the benefit of his purchase by any irregularity in the proceedings in a cause: vide *Lutwych v. Winford*, 2 Bro. C. C. 248. *Bennett v. Hamill*, 2 Sch. & Lef. 566. *Burke v. Crosbie*, 1 Ba. & Be. 501. *Lightburne v. Swift*, 2 Ba. & Be. 207.

1757.  
MANATON  
v.  
MOLESWORTH.  
WORTLEY  
v.  
MOLESWORTH.

[ \* 27 ]

19th Nov. 1757.

28th Jan. 1758.

S. C.

*Fearne's Ex.*

Dev. 388.

*Serg. Hill's MSS.**Perryn's MSS.*

[ \* 28 ]

It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise; and therefore a limitation in a settlement "to trustees to the use of *A.* the settler, for life, remainder to *B.*, his intended wife, for life, (except as thereafter excepted,) remainder to the heirs of the body of *A.*, begotten on *B.*, remainder to *A.* and his heirs, with a proviso, that if *A.* should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the said trustees should stand seised of one moiety, from and after the decease of *A.*, to the use of such child: held, a contingent remainder, and not a springing use, and therefore barred by a fine levied by *A.* and *B.*

*17th Ch. & 220.*

## CARWARDINE v. CARWARDINE.

(Reg. Lib. A. 1757, fol. 201.)

By indenture bearing date the 25th of *August*, 1708, *John Carwardine*, in consideration of his intended marriage with *Magdalena Williams*, and to the intent that a competent jointure might be provided for her, and to the intent that the lands and tenements therein mentioned might remain to the uses after mentioned, conveyed \* certain premises therein mentioned to trustees and their heirs to the use of the said *John Carwardine* for life, remainder to the said *Magdalena Williams*, his intended wife, (except in such cases as should be thereafter excepted,) for her jointure, remainder to the heirs of the body of the said *John Carwardine*, begotten on his said intended wife, remainder to the said *John Carwardine* and his heirs. Then came the following proviso: "And  
 " the special trust and confidence in the said trustees and  
 " their heirs is hereby declared to be, that if the said  
 " *John Carwardine* should happen to die, and leave such  
 " issue as aforesaid behind him, he, the said *John Car-*  
 " *wardine*, not making otherwise a provision for such  
 " child or children in his lifetime, then and in such case  
 " the said trustees shall stand seised of one moiety of the  
 " said premises from and immediately after the decease  
 " of the said *John Carwardine* to the use of such child  
 " or children as aforesaid, and be empowered out of the  
 " rents, issues, and profits of the said money, to raise  
 " such provision for such child or children as the said  
 " trustees and their heirs shall think fit."

*John Carwardine* and *Magdalena* his wife, after their

marriage, joined in levying a fine; and he by will devised all his estate from his eldest son, the plaintiff, who was totally disinherited.

1757-8.

CARWARDINE

v.

CARWARDINE.

The plaintiff, as heir at law, brought the present bill, First, to try the validity of the will. Secondly, to set aside a surrender of copyhold as not being pursuant to the custom. And, thirdly, to establish and have the benefit of the settlement on his father's marriage.

The cause coming on to be heard on the 14th of *July* 1756, an issue was directed, which was found in favour of the will: upon the second point the bill was dismissed, it being triable at law. It now came on upon the equity reserved.

The *Attorney-General* and Mr. *Comyn* for the plaintiff.

[ 29 ]

The estate, in the trustees under the proviso, remained untouched by the fine, which cannot bar executory devises and springing uses; for they being collateral to the other estates and remainders, immediately carved out and independent thereof, could only be affected by any deed which respects them.

The exception being introduced between the estate for life to the wife, and the remainders to the heirs of the body of the husband by the wife, it was antecedent to the estate tail, and the fine could not reach it.

*Hetley*, 98. A difference is laid down between a collateral use that does not depend on other estates and an estate limited by way of remainder. In the case of springing uses, as this is, and of executory devises, the whole fee given before need not be disturbed, but the estate before given opens to receive and let in the use upon the contingency happening: it is like the adding a link to a chain; the same link remains as before, and so here it lets in the estate, but does not operate to take away any of the estate before given.

1757-8.

CARWARDINE

v.

CARWARDINE.

This being so, the next question is, who is the person intended to take by this proviso? And then what shall he take?

The ground of this provision was in favour of an eldest son, and him only. In the limitation of the estate the words are, "heirs of the body," under which the first son would take the whole. Now in the proviso the words are, "such issue as aforesaid," which can relate only to heirs of the body. And though the words child and children are afterwards mentioned in the proviso, yet they must and can only refer to such issue as aforesaid, viz. heirs of the body.

As to what estate such eldest son would take, it must be a fee simple in one moiety, for the trust and confidence being to the trustees and their heirs, the estate must be co-extensive with the trust.

[ 30 ]

Mr. *Sewell* and Mr. *Wilbraham* for the defendants.

The first question is, whether under this settlement, which was a conveyance of the legal estate, this provision was in the power of the father, and any thing is left untouched by the fine? And this will depend upon the question, whether this is to be considered as a contingent remainder, or as a springing use? For if it was the first, it is clearly barred by the fine. *Archer's case*, 1 Co. 66.

The origin of springing uses is not to be traced. The maxim of law being that a fee cannot be limited upon a fee. Springing uses arose in order to give persons a power to provide for all the exigencies of their families; and therefore the court permitted them to arise within a reasonable compass of time (as in the compass of a life, and during the infancy of the first taker. *Lloyd v. Carey*, Prec. Can. 72.) And a springing use is in a deed what an executory devise is in a will; and the same rules are applicable to both.



Now a springing use always displaces the former estate, where the whole fee has been departed with. *Davis v. Speed*, 2 *Salk.* 675. A feoffment to the use of *A.* and his heirs, to commence four years from thence, was good as a springing use; so after the death without issue, if he died without issue within twenty years. This is good by way of springing use: but the reason of this is, because what is left undisposed of is in the feoffer in the mean time, and just in the same state as before the conveyance. And this is a certain rule, that it can never take effect by way of springing use or executory devise, when it can possibly take effect by way of remainder. *Purefoy v. Rogers*, 2 *Saund.* 380.

1757-8.  
CARWARDINE  
v.  
CARWARDINE.

This kingdom was for a long time extremely fond of perpetuities; but, when once broke through, they became as odious as they were before popular. Indeed, where the whole fee is disposed of, you may make a new disposition thereof, to arise within a reasonable compass of time. But there must be always a particular estate to support a remainder. For the law always took care that there should be a tenant to the freehold, liable to the actions of all persons who claimed any right. Now, wherever there is such a particular estate, any limitation afterwards must be construed a remainder. And in this case it must be considered as if a limitation to such issue had been placed in the parenthesis where the exception is to the wife's estate. And then, where the limitation is in the middle of the disposition of the fee, as in the present case, it must always be construed a remainder.

[ 31 ]

And further, in a springing use the whole estate that is to be displaced vests. Now, in the present case, the mother took an estate for life only in one moiety. As to the other, it was contingent, whether it could vest or not, and depended on the father's dying in the lifetime of the

1757-8.  
 CARWARDINE  
 v.  
 CARWARDINE.

mother, and leaving such issue unprovided for; and was a contingent remainder, and barred by the fine. As the father had a power to bar the heirs of his body, he might certainly bar the lesser provision. It was an estate wholly in the power of the husband: the first taker was certainly contingent, and destroyed before it came *in esse*.

But in all events this was not a provision for one child absolutely, but all the issue of the marriage unprovided for, and could be a provision for no longer than the mother's life, subject to the discretion of the trustees.

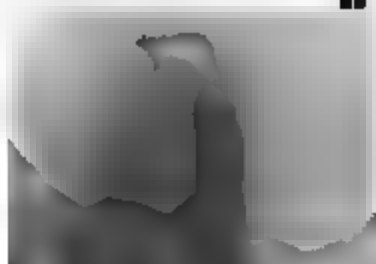
*The Lord KEEPER.*

29 Jan. 1758.

[ 32 ]

'This is a question arising upon a deed which is very imperfectly and inaccurately penned. It is a question of law arising upon a legal conveyance; a settlement executed, and not on articles, or by way of trust executory. I shall consider it in two lights: first, what was the intent of the parties to the deed: and, secondly, what is the legal operation of this indenture: and, as a consequence of that, whether the plaintiff, the heir at law, can take the whole estate during the wife's life, or whether he can take it jointly with his brothers and sisters, if any such are living.

As to the intent of this deed, that is more apparent than the operation of it. I think nothing can be plainer than that, upon the marriage, this settlement was made with the sole view of securing a jointure to the wife; and subject to that jointure no consideration was had of the children as against the husband, but only as against the jointure; and therefore it is clear that the settlor intended to have the estate in his own power subject to the jointure which he was to give his wife. Besides, the deed recites, "that John Carwardine, in consideration of his marriage with Magdalena Williams, and to the intent



" that a competent jointure might be provided for her,  
 " and to the intent that the lands and tenements might  
 " remain to the uses after mentioned," &c.

1757-8.

CARWARDINE

v.

CARWARDINE.

Though the intent is clear, the legal operation must control any thing that appeared to be the intent of the parties. The claim of the plaintiff against the act of the father arises from the anterior provision which is made for the children. The exception was intended to abridge what the wife had. It was not to give a moiety to her, but only to take out of her jointure a moiety subject to the limitation and discretion of the trustees.

The different considerations that have been made upon it are these. It has been strongly insisted upon by Mr. *Attorney-General*, that the court is not to extend the claim of the son, as the limitation is to be upon the event of the wife's surviving the husband, and there being issue male; he says the eldest son is meant, though the words, such child or children, are used, that they are synonymous to eldest son, because the relative "such" brings it back to the eldest son before described by heirs male.

[ 33 ]

I am of opinion, however, that that cannot be the construction; because here one moiety is limited to the trustees. For what?—For the maintenance, livelihood, and provision of the heirs of that marriage. The woman might marry again, carry away the whole estate, and his children have nothing to live upon: and therefore heirs male of the body, *secundum subjectam materiem*, must be all that claim as heir. Not only the first son, but every other son; and, if no son, there is a remainder to daughters, and the power of redemption is co-extensive with that construction. How is it to be redeemed?—By making a provision for the children generally. The issue of the marriage is not taken notice of as intended to be provided for by this deed. He has a power of barring

1757-8.

~~~~~  
 CARWARDINE
 v.
 CARWARDINE.

every interest under the settlement except the wife's; under that limitation he has introduced a contingent provision for the children; then he makes a proviso to set that loose again. How is that to be done? By his providing for his children in his life-time. He has an estate tail, which, by a fine, he might convert into a fee. He says, I will have a power to charge and to redeem the land; I will have a power to convert the land into money and make a provision for the children in a more commodious manner.

[34]

This being the meaning of the deed, the next question is, what has he done? and that will depend upon the legal operation of the deed. The counsel on both sides agree that it must be considered either as a springing use or a contingent remainder; and whether it be a springing use or a contingent remainder, the consequence is also admitted if that is once known.

For my own part I do not know by what rule of law it is that I can construe this to be a springing use. The notion of a springing use was introduced, as Mr. *Wilbraham* observed, just as executory devises were, to answer the exigencies of men, and to give them a power pretty much of the same nature as that which the law disallowed, in order that, after a departure with the whole fee, a new limitation of the fee might take place upon a contingency to arise within a reasonable compass of time, and not within the danger of a perpetuity; not that a fee could be limited upon a fee, but, upon a contingency happening, the former uses were to give way.

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards,

I do not myself recollect any case where a springing use was ever introduced in the middle of a limitation, but it always comes in afterwards and determines the first gift in fee, whether that gift be made of a fee to one and determines the first gift in fee: and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons.

person, or composed of a particular estate and remainders, and, whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons.

In the next place, it is a certain principle of law, that, wherever such a construction can be put upon a limitation, as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise. That rule is established, and I do not know any instance in which it has been deviated from (a).

Now the question will be, whether, upon this awkward deed, I can make such a construction as that this limitation may operate as a contingent remainder. I think, upon the whole, it must operate as a contingent remainder. There would be no difficulty in doing this. I limit such an estate to trustees, &c. to the use of myself for life; remainder, as to one moiety, to my wife for life; remainder, as to the other moiety, to the use of my children

1757-8.

CARWARDINE
v.
CARWARDINE.

[35]

(a) "If ever there existed a rule which has uniformly prevailed without any exception, it is that which is laid down by Lord Hale in *Purfoy v. Rogers*." Per Lord Kenyon, 3 T. R. 765, *et vid. Ives v. Legge*, *Fearne Ex. Dev.* 377. *Wealthy v. Bosville*, Rep. K. B. temp. Hardw. 258. *Doe v. Holmes*, 3 Wils. 237. 241. 2 Bl. Rep. 777. *Goodtitle v. Billington*, Doug. 753. *Doe v. Morgan*, 3 T. R. 763. *Doe v. Roach*, 5 M. & S. 482. In *Hopkins v. Hopkins*, For. 44. Lord Talbot decided in support of the intent that a limitation, which, in one event, would have operated as a remainder, but which event did not happen, should operate as an executory devise, and that determination has since been followed in *Brownwood v. Edwards*, 2 Ves. 249. *Doe v. Fonnereau*, Doug. 487. But where a preceding freehold has once vested, no subsequent accident will make a contingent remainder enure as an executory devise. *Reeve v. Long*, 2 Saund. 380, per Lord Mansfield in *Doe v. Fonnereau*, *Fearne's Ex. Dev.* 526.

1757-8.
 CARWARDINE
 v.
 CARWARDINE.

during the wife's life, in case they are unprovided for; remainder, as to this moiety, to the wife for life; remainder to the heirs of my body; remainder to myself in fee. That is a natural limitation, and is liable to no objection in point of law. It is, at all events, a limitation of a moiety, and of the other moiety a contingent use to the children.

If the present case were to be considered as an estate executed, I do not see how it would differ from the case which I have put. I limit the whole to my wife, except in such a case, which is, the having children unprovided for at the death of the husband, and she surviving. In that case he says, one moiety is to go to the use of my children. What children? Those which I have stipulated a right to redeem against, upon providing for them in my lifetime. All the children of the marriage must be meant.

[36]

Then is it an estate executed, or a trust? I think this is a limitation that is executed; I cannot take it to be a trust, or that any part of it is remaining in the trustees. I do not know any instance where, upon a legal conveyance, the court has taken the liberty of making it a trust upon collecting the intent of the testator or donor. I do not know any case where equity has considered an estate as not executed at the same time that law has considered it as executed.

No instance where equity has considered an estate as not executed at the same time that law would have considered it as executed.

Here, in this case, there is no use upon a use; it is to the trustees upon the trusts, &c. Thus, when the event here pointed out, upon which the moiety left to the children has happened, that the trustees should stand seised of the premises immediately after the decease of *John Carwardine*, to the use of such child or children, and to raise maintenance, &c. I have a notion that it

Limitation to trustees to stand seised and receive rents and profits to the use of *A.*, is an estate executed in *A.*

has been determined in this court, that where it is declared that the trustees should stand seised, and receive the rents and profits to the use of such a one, that the estate should be considered as executed (a). Here they

1757-8.

CARWARDINE
v.
CARWARDINE.

(a) This probably alludes to what is laid down in 1 Eq. Ab. 383. The distinction is, that where the limitation is to trustees and their heirs, in trust, to *receive* the rents and profits, and *pay them over* to A., the use is not executed in A. by the statute: but where the limitation is to trustees and their heirs, in trust, to *permit and suffer* A. to receive the rents and profits, there the use is executed in A. *Simpson v. Turner*, 1 Eq. Ab. 384. *Broughton v. Langley*, 2 Salk. 679. *Jones v. Lord Say and Sele*, 8 Vin. Ab. 262. *et vid.* Serjeant Williams's note to *Jefferson v. Moreton*, 2 Saund. 11. and the cases cited there. In *Doe v. Biggs*, 2 Taunt. 109. MANSFIELD, C. J., observed, "It is 'miraculous how this distinction has been established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustee." It was however recognized and acted upon in

that case, and has been in several others. *Bailey v. Ekins*, 7 Ves. 322. *Wagstaff v. Smith*, 9 Ves. 524, 525. *Brydges v. Wootton*, 1 Ves. & Be. 137. But where there is something to be done by the trustees which makes it necessary for them to have the legal estate, such as the payment of the debts of the testator, of rates and taxes, of repairs, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. *Gibson v. Rogers*, Amb. 93. *Bagshaw v. Spencer*, 1 Ves. 143. 2 Atk. 246. *Roberts v. Dixwell*, 2 Ves. 646. *Wright v. Pearson*, post. *Shapland v. Smith*, 1 Bro. C. C. 75. *Silvester v. Wilson*, 2 T. R. 444. *Kenrick v. Beauclerk*, 3 Bos. & Pull. 175. *Gregory v. Henderson*, 4 Taunt. 772. Or, where the intention of the testator is collected by a provision made in order to secure *femes-covert* a separate allowance, free from the control of the husbands, to effectuate which

[* 37]

1757-8.

CARWARDINE

v.

CARWARDINE.

are to be seised to the use of the children, and to receive the profits for the benefit of the children as they shall think proper.

I must therefore pursue the known operation of these words in the construction of this deed. I think that it is a contingent remainder. The consequence of which is, that, by the fine levied by the husband, in the event that has happened, that remainder has become extinct, and it passes to the younger son by the will.

Bill dismissed without costs.

it is necessary that the trustee should take an estate with the use executed, which is observed by *Mansfield*, C. J., 2 *Taunt.* 111, to have been the true ground of the decision in *Jones v. Lord Say and Sele, et vid. Neville v. Saunders*, 2 *Vern.* 415. *Harton v. Harton*, 9 *East*, 653.

[38]

1758.

7th & 8th Feb.

S. C.

Amb. MSS.

Sewell, MSS.

STEPHENSON v. HEATHCOTE.

Et è contra.

(Reg. Lib. B. 1757. fol. 124.)

Devise of real estate to testator's wife, her heirs, and assigns, in trust, by sale of so much and such part of the premises as should be necessary, to advance and raise so much money as would fully pay off and satisfy all his just debts and funeral expenses, and all the residue to her for life, remainder to testator's heirs on her body begotten. Testator gave to his uncle his tobacco-box, and the residue of his personal estate whatsoever to his wife for ever, and appointed her executrix: held, the personal estate not exonerated from the payment of debts.

JOHN HARPUR, by his will, bearing date the 25th of April, 1753, gave all his lands, &c. (except in *Alvaston*, in the county of *Derby*), to his wife, her heirs and assigns, in trust, by sale of so much and such part of the premises, as should be necessary, to advance and raise so much money as would fully pay off and satisfy all his just debts and funeral expenses, and all the residue of the premises he gave to his said wife for life, remainder

to her for life, remainder to testator's heirs on her body begotten. Testator gave to his uncle his tobacco-box, and the residue of his personal estate whatsoever to his wife for ever, and appointed her executrix: held, the personal estate not exonerated from the payment of debts.

Parol evidence of testator's intention to give his personal estate exempt from debts, rejected.

to his heirs on her body begotten, with divers remainders over.

The testator gave his lands in *Alvaston* to his heirs on the body of his said wife begotten, with remainder to the defendant, his sister, in fee. The testator also gave to his uncle, *Francis Meynell*, his tobacco-box; and lastly, all the residue of his personal estate, whatsoever, he gave and bequeathed to his wife for ever, and he appointed her executrix.

The testator left a personal estate of the value of £700, and was indebted upon mortgage about £1500, besides other debts.

The bill in the first cause was brought by the widow, to have the testator's debts paid and discharged out of the real estate, and to have the personal estate exonerated, and that the defendants might pay a proportionable share of the mortgage. The cross bill was to carry the trusts of the will into execution, for an account of what was due on the mortgages, and that, if the personal estate were not sufficient, a competent part of the real estate might be sold.

Parol evidence was offered to be read on the part of the executrix, to shew the intention of the testator to give his personal estate exempt from debts; and *Lady Gainsborough v. Lord Gainsborough*, 2 Vern. 252, and *Lady Granville v. Duchess of Beaufort*, ib. 648, were cited.


The Lord KEEPER.

I have a very great disinclination to admitting parol evidence to explain a will. At common law it is a rule that no parol evidence can be given of a man's intent, who has put it into writing, except to explain a latent ambiguity. *Lord Cheney's case*, 5 Co. 68. *Counden v.*

1758.

STEPHENSON
v.
HEATHCOTE.

[39]

1758.

 STEPHENSON
 v.
 HEATHCOTE.
 [* 40]

Clark, Hob. 32. Jones v. Newman (a). Dowset v. Sweet (b). Lowfield v. Stoneham, 2 Str. 1261 (c).

* The case of Lord and Lady Gainsborough has been cited as a decree founded on parol evidence. If I could satisfy myself upon what grounds that decree was founded,

(a) *Black. Rep. 60.*

(b) *Amb. 175.*

(c) "From whatever cause the ambiguity proceeds, whether from a misdescription of the estate, or from a misdescription of the person, if there be a latent ambiguity, the parol evidence is admissible," per Mansfield, C. J. 3 *Taun.* 133. As to admitting it to ascertain the person of a devisee, *vid. Cheney's case, 5 Co. 68. Altham's case, 8 Co. 155. Harris v. Bishop of Lincoln, 2 P. W. 135. Beaumont v. Fell, ib. 140. Baylis v. the Attorney-General, 2 Atk. 239. Ulrich v. Lichfield, ib. 373. Castledon v. Turner, 3 Atk. 258. Goodinge v. Goodinge, 1 Ves. 231. Hampshire v. Pearce, 2 Ves. 216. Jones v. Newman, Bl. Rep. 60. Dowset v. Sweet, Amb. 175. Bradwin v. Harpur, ib. 374. Andrews v. Dobson, 1 Cox, 425. Hussey v. Berkley, post. vol. II. 194. Garth v. Meyrick, 1 Bro. C. C. 31. Hunt v. Hort,*

3 *Bro. C. C. 311. Delmare v.*

Rebello, ib. & 1 Ves. 412.

Parsons v. Parsons, 1 Ves.

jun. 266. Abbot v. Massie, 3

Ves. 148. Thomas v. Thomas,

6 *T. R. 671. Price v. Page,*

4 *Ves. 480. Doe v. Danvers,*

3 *East, 303. Smith v. Coney,*

6 *Ves. 42. Careless v. Care-*

less, 1 Meriv. 384. As to ad-

mitting parol evidence to as-

certain the subject-matter of

the devise, *vid. Pendlestone v.*

Grant, 2 Vern. 517. Hodg-

son v. Hodgson, ib. 593. Fon-

nerreau v. Poyntz, 1 Bro. C. C.

472. *Baugh v. Read, 1 Ves.*

jun. 259. Selwood v. Mild-

may, 3 Ves. 306. Dobson v.

Waterman, cit. ib. Whitbread

v. May, 2 Bos. & Pul. 593.

Doe v. Brown, 4 East, 441.

Doe v. Oxendon, 3 Taunt.

147. *Goodtitle v. Southern, 1*

M. & S. 299. Doe v. Green-

ing, 3 M. & S. 171. Sand-

ford v. Chichester, 1 Meriv.

653. *Colpoys v. Colpoys, 1*

Jacob, 451.

I should think myself bound by it; but it seems, by the petition of appeal, to have been founded in fraud in the drawer of the will, who designedly omitted to frame the will according to the instructions which he had received.

In the case of resulting trusts for the benefit of the next of kin, it is not to be questioned but that executors may make use of parol evidence to rebut their equity (a). But the present case does not turn upon the point of rebutting equities. The executrix brings her bill to be reimbursed what she has paid in the course of law: and the evidence offered is to shew what was given to the executrix by the will in writing. If parol evidence were admitted in the present case it might be admitted in every one.

But, without considering it as the bill of the executrix, I rely on this, that in all the cases in which parol evidence has been admitted, it has been for the purpose of supporting legal rights against an equitable claim. If the heir had brought the bill, I think it would have made no difference. The executor has no right to the personal

1758.
STEPHENSON
v.
HEATHCOTE.

[41]

Parol evidence is only admitted to support legal rights against an equitable claim.

(a) It is now fully settled that external evidence, and all parol declarations, whether made before, or at, or after the making the will, are admissible in favour of an executor, to whom a legacy is given, to rebut the resulting equity for the next of kin, *Littlebury v. Buckley*, 2 Vern. 677. *Batchelor v. Searle*, ib. 736. *Petit v. Smith*, 1 P. W. 7. *Rawlins v. Powell*, 1 P. W. 197. *Lady Granville v. Duchess of Beaufort*, ib. 114.

Rachfield v. Careless, 2 P. W. 158. *May v. Lewin*, cit. ib. *Neron v. Newton*, cit. ib. *Duke of Rutland v. Duchess of Rutland*, ib. 210. *Blinkhorn v. Feast*, 2 Ves. 27. *Lake v. Lake*, 1 Wils. 318. *Nourse v. Finch*, 2 Ves. jun. 78. & 465. *Thornton v. Lacey*, ib. 149. *Trimmer v. Bayne*, 7 Ves. 518. *Walton v. Walton*, 14 Ves. 318. *Langham v. Sandford*, 17 Ves. 435. affirmed on appeal, 2 Meriv. 6.

1758.

STEPHENSON
v.
HEATHCOTE.

estate until the debts are paid, nor can he call upon the heir to pay them. The specialty creditors indeed may proceed either against the heir or the executor; but, as the personal estate has been augmented by the debts contracted, so is it at all events the primary fund. The coming here to throw the debts upon the personal estate is a kind of legal right, not a particular special equity. If parol evidence were to be admitted here, it would be pregnant with great mischiefs and inconveniences; and I think the courts should not go a single step further than the cases have already gone (a).

[42]

Upon the merits three questions were made; but the first, which was whether the residue of the personal estate was to be exempted from the payment of debts? was principally contested.

The *Attorney-General*, the *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Hoskins*, for the executrix.

As between the executrix and the heir at law the personal estate is the principal fund for the payment of debts. The old cases required an express declaration to exonerate the personal estate. *Fereyes v. Robinson* (b). But courts of equity have deviated from that general rule, where the intent of the testator has been clearly expressed, that the personal estate should be exempted from

(a) Parol evidence cannot be admitted to raise, but only to rebut an equity. *Fordyce v. Willis*, 3 Bro. C. C. 577. *Freemantle v. Banks*, 5 Ves. 79. *Monck v. Lord Monck*, 1 Ba. & Be. 298. But it may be adduced by the next of kin in opposition to the rebutting evidence of the executor, and in support of the original presumptive equity. *Rachfield v. Careless*, 2 P. W. 158. *Langham v. Sandford*, 17 Ves. 435. 2 Meriv. 6. (b) *Bunb.* 301.

its natural burthen. *Bamfield v. Windham* (a), *Wainwright v. Bendlowes* (b), *Stapleton v. Coleville* (c). In the present case the intention is very clearly expressed: it is not a charge for the payment of debts, as there was in *Stapleton v. Coleville*; but the words fully to sell are tantamount to an express direction to sell. The devise of the residue is very material: it is to the wife, not in the character of executrix, but as residuary legatee. The giving the specific legacy to the uncle shews that the residue intended is the residue subject to that deduction only, and affording an inference that the personal estate was to go subject to no other charge. The great amount of his debts compared with his personal estate, is another strong circumstance by which we may infer the testator's intention: in making this devise, he intended a benefit to his wife, which will be necessarily defeated, unless the personal estate is exonerated. This was laid great stress upon by Lord *Talbot* in *Stapleton v. Coleville*: his words are, "what the quantum of the debts or the amount of the personal estate was at the testator's death does not appear; if it did, it would give great light into this matter."

Mr. *Perrot*, Mr. *de Grey*, and Mr. Serjeant *Hewitt*, for the defendant contended, that there was not sufficient evidence of an intention to exonerate, and cited *French v. Chichester* (d), *Cutler v. Coxeter* (e), *Lucy v. Bromley* (f), *Hazlewood v. Pope* (g), *Cayle v. Crofts* (h), and *Bromhall v. Wilbraham* (i).

1758.
STEPHENSON
v.
HEATHCOTE.

[43]

(a) *Prec. Can.* 101.

(b) 2 *Vern.* 718.

(c) *For.* 202.

(d) 2 *Vern.* 569.

(e) *Ib.* 301.

(f) *Fitz.* 41.

(g) 3 *R. W.* 322.

(h) 4 *Vin. Ab.* 468.

(i) *For.* 274.

1758.

The Lord KEEPER.

STEPHENSON
v.
HEATHCOTE.

Upon this will three questions have arisen, the first of which is upon the claim of the personal estate, made by the widow, exonerated from the payment of debts and funeral expenses.

The ruling principle in the construction of wills is, that the court is bound to find out the intention of the testator, if it be possible so to do, however inartificially the will may be expressed. But this intention must be discovered from the words of the will itself, and not from extrinsic circumstances: and the court must proceed upon known principles and established rules, not on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances.

Court not to inquire into the amount of the personal estate, whether sufficient or not to pay testator's debts.

[* 44]

We are not to inquire into the amount of the personal estate to know whether it be or be not sufficient to pay the testator's debts, because that would be to establish a general rule, that in every case where the personal estate is *insufficient, it must be presumed to be the testator's intention to charge his real estate with the payment of all his debts (a). Besides, the personal estate is vague

(a) There are instances of judges (like Lord *Talbot* in *Stapleton v. Coleville*) considering the amount of the testator's estate as a circumstance to be inquired into, so as to furnish a ground for construction: as in a remarkable case mentioned by Lord *Kenyon* (7 T. R. 640. viz. the case of *Oates v. Brydon*), where, after the argument (3 Burr. 1895.), and before the decision, Lord *Mansfield* directed certain inquiries to be made respecting the value of the estate devised, which at the time gave dissatisfaction to the profession.

As a general rule, it seems settled that the court cannot enter into the inquiry. *Walker v. Collier*, Cro. Eliz. 379. Lord *Inchiquin v. French*, 1 Cox, 8. *Doe v. Fyldes*, Comp. 833. *Standen v. Standen*, 2 Ves. jun. 593. 6 Bro. P. C. ed. Toml. 193. *Hales v.*

and uncertain, and subject to great fluctuations: few men know what their personal estate is. Suppose a further security for a large sum should afterwards be discovered.

1758.
STEPHENSON
v.
HEATHCOTE.

In the present case, the testator having constituted his wife trustee of the real estate for payment of his debts, appointed her also to be his executrix. But although he has given her a power to sell his real estate, "fully to pay and satisfy his debts," this is no more than making his real estate auxiliary to his personal, and not to be applied in the first place. The word "fully" is of great force and effect: it is a word of reference, and shews the devise of the real estate was intended to be only *in aid* according to the rules of law, that the personal estate must be first applied, unless it appears to be the testator's clear intention to exempt it, and to throw the debts wholly on the real estate. I agree with the determinations in the cases cited, that there is no need of express words in a will to exempt the personal estate from payment of debts, if the intent does otherwise appear: but I do not see any words in this will which indicate such an

[45]

<p><i>Margerum</i>, 3 <i>Ves.</i> 299. & vid. <i>Duke of Ancaster v. Mayer</i>, 1 <i>Bro. C. C.</i> 466. <i>Brummel v. Prothero</i>, 3 <i>Ves.</i> 113. <i>Alldridge v. Lord Walscourt</i>, 1 <i>Ba. & Be.</i> 315. <i>Bootle v. Blundell</i>, 1 <i>Meriv.</i> 222. & vid. <i>Judd v. Pratt</i>, 13 <i>Ves.</i> 168. <i>Attorney-General v. Grote</i>, 3 <i>Meriv.</i> 316. <i>Gittins v. Steele</i>, 1 <i>Swa.</i> 29. <i>Jones v. Curry</i>, <i>ib.</i> 66. And as to the application of the doctrine to powers, vide the cases cited</p>	<p>by the editor in the note to <i>Andrews v. Emmott</i>, 2 <i>Bro. C. C.</i> 297. But in the case of <i>Colpoys v. Colpoys</i>, 1 <i>Jacob</i>, 451, Sir <i>T. Plumer</i>, on the ground of the subject-matter of the bequest being designated on the face of the will by imperfect or equivocal terms, admitted evidence of the amount of the testator's property, to explain the bequest.</p>
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1758.

STEPHENSON
v.
HEATHCOTE.

intention; on the contrary, the word “fully” is repugnant to any such intention.

As to the residuary clause, I look upon the gift of the tobacco-box to be nothing. An argument has been drawn from that, and the gift of the rest of his personal estate to his wife, that his intention was to make the land the primary fund; but the personal estate may be given by the word “residue,” as well as by words expressing “all the personal estate.” Unfortunately for that construction, the clause does not end at the words “for ever:” nor does it go on to say (as it should have done if that had been the intention), “for her own use;” but instead of that the testator has added, “whom I make my executrix,” which is a kind of legal trust, if I may so express myself. It is a devise to her as executrix.

Another thing which has great weight with me is, that the testator’s principal object was a provision for the children whom he might have by his wife. He cannot be supposed to have so far preferred his wife to his children as to have given her the whole personal estate, free from the payment of debts, and thrown the entire burthen of them upon the estate to which he intended that they should become entitled after her decease. And the present event of his having no children is not to be alone attended to.

I am therefore of opinion, that there is not sufficient in the present will to exempt the personal estate.

[46]

This case was stated and relied upon by the court, in the *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454. and *Bootle v. Blundell*, 1 Meriv. 193.

ject has been thus succinctly stated by Lord *Eldon*. The old law was, (*Fereyes v. Robinson*, Bunb. 301.) I regret that it is not law still, that the personal estate could not be exempted without ex-

The doctrine upon this sub-

press words. That yielded to the doctrine of *demonstration clear and declaration plain.* We have now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered." 1 *Swa.*

28. This intent must be, as stated by his Lordship in another place, "so expressed as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal." 1 *Meriv.* 193.

In the following *cases the personal estate has been considered as not exempted. *Cutler v. Coæter*, 2 *Vern.* 301. *Doleman v. Smith*, *Prec. Can.* 456. *French v. Chichester*, 2 *Vern.* 569. *Hazlewood v. Pope*, 3 *P. W.* 322. *Lord Inchiquin v. French*, *Amb.* 33. 1 *Wils.* 82. 1 *Cox*, 1. *Samwell v. Wake*, 1 *Bro. C. C.* 144. *Duke of Ancaster v. Mayer*, *ib.* 454. *Gray v. Minnethorpe*, 3 *Ves.* 103. *Brummel v. Prothero*, *ib.* 111. *Tait v. Lord Northwick*, 4 *Ves.* 816. *Hartley v. Hurle*,

5 *Ves.* 540. *Bridges v. Philips*, 6 *Ves.* 567. *Watson v. Brickwood*, 9 *Ves.* 447. *Aldridge v. Lord Walscourt*, 1 *Ba. & Be.* 312. *Tower v. Lord Rous*, 18 *Ves.* 132.—In the following cases the personal estate has been considered exonerated:—*Wainwright v. Bendlowes*, 2 *Vern.* 718. *Bamfield v. Windham*, *Prec. Can.* 101. *Adams v. Meyrick*, 1 *Eq. Ab.* 271. *Stapleton v. Coleville*, *For.* 202. *Phipps v. Annesley*, 2 *Atk.* 57. *Bicknell v. Page*, *ib.* 79. *Walker v. Jackson*, *ib.* 624. 1 *Wils.* 24. *Philips v. Nicholas*, & *Holliday v. Bowman*, *cit.* 1 *Bro. C. C.* 145. *Anderton v. Cook*, *Kynaston v. Kynaston*, & *Glede v. Glede*, *cit. ib.* 456. *Webb v. Jones*, 2 *Bro. C. C.* 60. 1 *Cox*, 245. *Williams v. Bishop of Landaff*, 1 *Cox*, 254. *Burton v. Knowlton*, 3 *Ves.* 107. *Gaskill v. Hough*, *cit. ib.* *Hancox v. Abbey*, 11 *Ves.* 179. *Bootle v. Blundell*, *cit. sup.* *Gittins v. Steele*, 1 *Swa.* 24.

1758.

STEPHENSON
v.
HEATHCOTE.

[* 47]

10th Feb. 1758.
S. C.
Perryn MSS.

REYNOLDS v. MEYRICK.

(Reg. Lib. B. 1757. fol. 202.)

Devise to *A.* for life, with remainder to his first and other sons, remainder to his daughters; and, in default of such issue, the premises to stand charged with two sums, to be paid after the death of *A.* without issue, and subject to such charge over, with a power to *A.* of jointuring the whole estate, which he executed, *A.* dying without issue, held that the sums only carried interest from the death of the jointress, who survived him.

DAME CLEMENCE MONTGOMERIE, by her will bearing date the 13th of *July*, 1719, after providing for her daughters out of certain estates in *Ireland*, devised as follows: "And as to all my manors, &c. not otherwise by this my will disposed of, subject nevertheless to the provisional payments, limitations, and conditions hereinafter particularly mentioned, I give, devise, and appoint the same to the child *Hugh*, commonly called *Hugh Montgomerie*, for the term of his natural life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters in tail; and, failing such issue, I will that the said manors, &c. shall stand charged with and be subject to the payment of £500 a-piece to the children, commonly called *Charlotte*, *Maria*, and *Dorothy Montgomerie*, which I will shall be raised and paid them within six months after the death of the said *Hugh Montgomerie* without such issue, and subject to such charge and payment to my daughter, *Elisabeth Maria Louisa*, for life, remainder to her issue in tail, with remainders over. Provided always, and my will is, that in case the said *Hugh Montgomerie* shall happen to marry, that then it shall and may be lawful to and for the said *Hugh Montgomerie* to make any settlement or conveyance of all or any part of the said manors, &c. in jointure upon such wife or wives only as he shall happen to marry."

Hugh entered after her death, and married *Mary*

Bingham, upon whom he settled the whole estate for her jointure.

* In 1741 *Hugh* died, leaving a widow and two sons, who both died without issue, the younger, *Hugh*, who was the survivor, dying on the 16th of *October*, 1743. *Mary Montgomerie*, the widow of *Hugh*, died on the 6th of *February*, 1754.

This was a bill by the daughters and their husbands to have the two sums of £500 and £500 raised out of the estate, with interest from six months after the death of *Hugh Montgomerie*, the son.

Two questions were made; first, whether the two legacies of £500 each to the children, *Charlotte*, *Maria*, and *Dorothy*, should carry interest from the end of six months after the death of *Hugh Montgomerie* the son, or from the decease of *Mary* the jointress? And, secondly, supposing interest payable from six months after the death of *Hugh* the son, whether the assets of *Mary* the jointress should be liable to the payment thereof during the time, or whether it would remain a charge upon the inheritance.


Mr. *Sewell*, Mr. *Perrot*, and Mr. *Capper*, for the plaintiffs.

The general rule is, where a present legacy is given without mentioning any particular time of payment, it will carry interest from one year after the testator's death; and if such legacy be given to a child, it will carry interest from the testator's death. In this case the inconvenience suggested is, that there will be a charge on the inheritance in the hands of the reversioner. But wherever a person claims an estate under the will, he must take it subject to all the charges imposed upon it by the testator, and upon the terms imposed.

That it is no hardship that a legacy is to be raised

1758.

REYNOLDS
v.
MEYRICK.
[*49]

1758.

 REYNOLDS
 v.
 MEYBICK.

upon a reversioner is proved by the cases of *Bacon v. Clark*, 1 P. W. 478. *Greenhill v. Waldoe*, Prec. Can. 367. Nay, children's terms have been raised out of the reversion, in the lifetime of the father, which is going much further than is required in the present case.

[50]

But a further argument arises in this case from the different penning of the will. It is plain that the testatrix had a different intention in respect of the first legacies to the plaintiffs, and the legacies after given to other persons, where she directs that they shall not be paid till a year after the person comes into possession of the estates on which they are charged. These legacies are said to be given in satisfaction of all demands the children could have upon her and her estate, which must imply a precedent demand in the children. Now, if they were to wait till the death of *Hugh* without issue, and also the death of the jointress, who might live forty years, these legacies would be worth nothing, and could not be a satisfaction.

The second question is, who ought to pay the plaintiffs? The legacies and interest must certainly be a charge upon the inheritance; for the court cannot say that the jointress was liable, because she comes under the old use antecedent to this charge.

The *Attorney-General*, the *Solicitor-General*, and Mr. *Wilbraham*, for the defendants.

The legacies which the plaintiffs claim are now certainly raisable; the only question is from what time they shall carry interest. We insist only from the death of the jointress. If they were raisable in the jointress's life, they must have been raised out of the reversion, and clearly could not affect her estate. The court will never mortgage the reversion, unless the words are so very strong that they are compelled to do it, and will not ruin the

person that is to have the inheritance, in order to favour the younger children. *Brome v. Berkley*, 2 P. W. 484. *Adams v. Horwood*, cor. *Hardwicke* C. 1755 (a).

The string of cases on that head are, where trust terms are created for raising portions for younger children at eighteen or marriage. But this court never charges the reversion even for children, where the legacy or provision is by way of additional portion. Now it appears here that the plaintiffs were provided for by their father's will and settlement, and the mother gives them a present provision out of her Irish estate. Besides, these legacies are given on future contingencies, so remote as not to be expected or waited for, a general failure of issue of *Hugh*. So that they must stand upon the foot of common legacies, depending on the mere bounty of the testator; and then is there any case where such mere money legacies charged upon land were held raisable before the estate comes into possession? As to the case of *Bacon v. Clark*, there the estate was given on condition that he should pay £1000, and this was personal confidence; and the estate would have been forfeited on breach of the condition, if the party had not been the heir at law.

And this brings it to the construction of the words of the will, by which an estate tail is given to *Hugh*. But if there was failure of issue of *Hugh*, then *Elisabeth Louisa* shall have the estate, subject to the charge, which plainly shews an intention in the testatrix to give her a preference; but in that event, the younger sisters should have £500 each. From the nature of these provisions, they are all to take place at the same time.—Now the jointure interest must necessarily take place on *Hugh's*

1758.

REYNOLDS
v.
MEYBICK.

[51]

(a) The Editor has not gister's book; the last entry been able to find any state- is A. 1754, fol. 316. ment of this case in the re-

1758.

REYNOLDS
v.
MEYRICK.

[52]

death, and therefore the limitations ought to stand in this manner, viz. to *Hugh* for life, remainder to the jointress for life, remainder to the first and other sons of *Hugh*, &c., remainder to *Elizabeth Louisa* for life, subject to the charge, remainder over. And this was determined by the late Lords Commissioners, in the case of *Churchman v. Harvey* (a), where an estate limited in jointure, under a power, was held to put back and postpone the term created for raising portions for younger children, for the power operates as an original use. So in this case, the estate for life to the jointress must interpose before the charge, and postpone it.

In this case the legacies in question are charged upon land, no one liable personally for the payment of them, nor are there any trustees appointed to raise them. Now could the land satisfy them in the lifetime of the jointress? It could only be done by making the dry reversion liable.

No interest is here given by the express words of the will, and therefore must be subject to the directions of the court, and will be given, as is done by a jury for the detention of a debt due: now in this case there was no debt till *Elizabeth Louisa* came into possession; and therefore they can only carry interest from the death of *Mary* the jointress in 1754.

Mr. *Sewell* in reply.

In *Brome v. Berkeley*, and *Adams v. Horwood*, the question was as to the time when the portions should be raised, not as to the payment of interest. In *Bacon v. Clark* the condition made no difference; the court determined it on the ground of there being a trust and a charge on the estate, for the condition was void. The only question in *Churchman v. Harvey* was, whether the trust-term should be postponed to the jointure. The por-

(a) *Amb.* 335.

tions there were not to be raised till the term came into possession by the words of the will; and, as soon as the term was postponed, every thing else was consequential.

These objections being removed, it brings this case back to the words of the will, which says, the legacies shall be paid within six months after failure of issue of *Hugh*. The rule is, that when the contingency happens, and the interest becomes certain and vested, the portions shall be raised. In this case, whether there would have been a jointress, or not, was uncertain. If there was not, these legacies were certainly to be raised within six months after the contingency happened; but, if there was a jointure, the will is silent, and has not made any provision to prevent the legacies being raised in that event: and these legacies and interest must be chargeable upon the inheritance, because there can be no pretence to say the jointress should have kept down the interest in her time, as the legacies were no charge on the estate antecedent to her estate for life.

1758.

REYNOLDS
v.
MEYRICK.

[53]

The Lord KEEPER.

The early cases in this court went so far as to raise portions on reversionary terms in the life of parents, the time of payment being come, and gave them interest from that time as for the detention of a debt. By that equity, they exhausted family estates, encouraged disobedience, and set up an unnatural independency. These considerations have, of late, introduced a different, and, I think, a more reasonable construction to settlements, by taking the design of the whole settlement into consideration, and has not extorted fruit from a barren reversion, except where the owners have expressly directed it (a).

(a) As to this point, *vide Cholmondeley v. Meyrick, post. 177. and note.*

1758.

REYNOLDS

v.

MEYRICK.

[54]

This is not the case of a portion or provision for children, but is a mere legacy given by a mother in a state of nature to her children otherwise provided for; and therefore the only question is, when this legacy was intended by the will to be paid, for she might have charged it either on the estate, or on the remainders, on failure of issue of *Hugh*. If she had said the two sums of £500 shall be paid within six months after the failure of issue of *Hugh*, and are then to be raised, I should have thought it would have over-ride the jointure, been a charge on that estate, and that the jointress must have kept down the interest for life.

It is admitted by the counsel for the plaintiffs, that it does not charge the jointure; they must therefore be considered as admitting that it is not to be raised out of the land from six months after the death of *Hugh*, unless he survived his jointress, and yet it is contended that the interest ought to attach, and run on the reversion. This might, in consequence, and in great probability, make the estate less valuable than the charge on it, which certainly was not the intent of the testator.

But the admission that the jointress was not chargeable (which indeed cannot be contended for), is an admission that the words "payable within six months after the death of *Hugh*," are not absolute words, but must be explained by the context, with this restriction, *there being then no jointress in being*.

"And, failing such issue, I will the lands should stand charged with, and be subject to, the payment of the said sums of £500, and £500, which I will shall be raised and paid within six months after the death of *Hugh*, without such issue as aforesaid, and subject to such charge as aforesaid, to *Elizabeth Maria Louisa*, &c." It would be extraordinary to say, though the time of payment attaches on a fruitful estate, such as the

jointure, according to the express words, yet that it shall not attach so as to take interest out of the fruitful estate, but out of the barren reversion by anticipation.

I think the limitations in the will, and the manner of the wording the charge, will not warrant that construction.

The words "within six months after the death of *Hugh*, without such issue as aforesaid," are synonymous to these, "on the estate in remainder to *Elizabeth Maria Louisa*, coming into possession." But after she had used these words, she gives the power to jointure, and postpones the payment to another estate.

Let the two sums of £500, and £500, be raised with interest at £4 per cent. from the death of *Hugh Montgomerie's* wife.

1758.

REYNOLDS

v.

MEYRICK.

[55]

SPURGEON v. COLLIER.

(Reg. Lib. B. 1757, fol. 212.)

1901. 2 Ch. 153
1902. 2 Ch. 376

1758.

11th, 21st, & 22d
February.

PETER TUBBING being seised of an estate, called *Hillingdon*, in the county of *Norfolk*, which he had mortgaged for £1000, the defendant, *Collier*, offered to advance £200 more to him, and to pay off the £1000 mortgage. *Tubbing* thereupon, by indenture bearing date the 17th and 18th of *April*, 1735, in consideration of the said sums of money conveyed the said premises to *Collier* and his heirs, absolutely, with the usual covenants, and a covenant for further assurance. By an indenture

Absolute conveyance, and a deed of defeasance, on payment of mortgage-money, during the joint lives of mortgagor and mortgagee, held a restraint upon mortgagor; and a redemption decreed, there being also fraudulent and oppres-

sive conduct on the part of the mortgagee.

Settlement after marriage, held to be voluntary, proof of its having been made in pursuance of a parol promise before marriage, failing, and court of opinion, that even if such promise had been proved to have existed, it would not have supported a settlement made after marriage.

1758.
 SPURGEON
 v.
 COLLIER.

of even date, reciting the above conveyance and mortgage, *Collier* covenanted to reconvey the premises, on payment of the said two sums of £1000 and £200 in their joint lives ; and it was agreed that *Tubbing* should be tenant of the premises, at the rent of £70 per annum.

In 1737, *Peter Tubbing* being in arrear for rent to *Collier*, was arrested by him and carried to prison, and from thence removed by the means of *Collier* to the house of one *Carr*, where *Collier* endeavoured to prevail upon him to deliver up the deed of defeasance. He however refused this, and made out a bill of sale of all his estate and effects to *Peter Tubbing*, his son, and soon afterwards died. *Collier* afterwards prevailed upon *Peter Tubbing* the younger to deliver up to him the deed of defeasance. *Collier* had been in possession of the estate ever since the conveyance, and had made several very extensive improvements on it.

[56]

On the 5th of *July*, 1751, a marriage took place between the defendant, Dr. *Alston*, and *Mary Collier*, the niece of the defendant *Collier*. No settlement was executed previous to it ; but it appeared in evidence, that *Collier* had produced to *Alston* the deed of conveyance ; and though no absolute promise by *Collier* was proved, that he would settle the estate upon his niece, yet there were many declarations in evidence of his to the effect that he had given the estate at *Hillingdon* to his niece as part of her marriage portion ; and that the reason why they were married before any settlement was executed, was because the writings could not be finished in time, as he wished the marriage to take place on the 5th of *July*, which had been his own wedding-day.

By indenture of settlement, bearing date the 9th and 10th of *August*, 1751, and made between *Daniel Collier* of the first part, Dr. *Alston* and *Mary* his wife of the

second part, and two trustees of the third part, in consideration of a marriage had between Dr. *Alston* and *Mary* his wife, the defendant *Collier* conveyed the premises at *Hillingdon* to Dr. *Alston* for life; remainder to his wife for life; remainder to their first and other sons in tail male; remainder to their daughters as tenants in common, with remainders over. Dr. *Alston*, by his answer, said, that he had had no notice of the deed of defeasance till 1753. The bill was brought by the heirs at law of *Peter Tubbing* the younger, praying an account of the rents and profits, and a redemption.

Mr. *Perrot* and Mr. *de Grey* for the plaintiffs.

The restriction of the time of redemption in the deed of defeasance is against conscience, and therefore void; and there can be no doubt as to the plaintiff's right to a redemption as against *Collier*. The defendant *Alston* is, however, not in a better situation to defend himself. The conveyance to him is after marriage; and even supposing a settlement made after marriage, in pursuance of a parol agreement before, to be good (for which, however, there is no authority), yet there is no proof of any such agreement in the present case. In *Penn v. Emerson* (a), 19th November, 1754, Lord *Hardwicke* held, that a parol agreement before marriage could not be supported by a recital in a settlement after marriage of "other good causes and considerations"; and in *Seamer v. Bingham* (b), a settlement was made the day after marriage, reciting an agreement before marriage, which agreement, however, was not proved. Lord *Hardwicke* held, that he could only take it as a voluntary deed.

The *Attorney-General*, and Mr. *Jones*, for the defendant *Collier*, contended, that he must be considered as

1758.
SPURGEON,
v.
COLLIER:

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[57]

(a) The Editor has not been able to find any entry of this case in the *Register's* book.

(b) 3 *Atk.* 54.

1758.
 ~~~~~  
 SPURGEON  
 v.  
 COLLIER.

a purchaser *ab initio*; but that at all events he was entitled to the benefit of the improvements made by him upon the estate.

The *Solicitor-General* and Mr. *Capper* for the defendant *Alston*, and Mr. *Wilbraham* for *Samuel Alston*, his infant son.

The case of Dr. *Alston*, though treated *obiter* in the books, has never been fully handled. The single question is, whether a settlement made after marriage, upon a parol agreement made before marriage, is valid. And, though a parol agreement will not support a suit since the Statute of Frauds, yet it will have such an effect as to make a subsequent settlement, made in consequence of it, to proceed on a valuable consideration. There is, indeed, no actual decision upon it, but the strong expression of Lord *Macclesfield*, in the case of *Lady Montacute v. Maxwell* (a), clearly shews that such a settlement would be supported, without contending that marriage is a part performance. His lordship observed, that "a parol promise on marriage is sufficient to support a settlement made agreeable to it after marriage. This had been frequently determined." In *Lavender v. Blakstone*, 2 *Lev.* 146. it was held by Lord *Hale*, "though it was proved that an infant in that case upon his marriage promised to settle his estate, when he came of age, upon himself and his issue, (which, it was agreed, was a sufficient consideration to avoid fraud, though an infant, by law, is not compellable to perform such promise,) yet this settlement not being made till three or four years after he came of age, and not being made directly, according to the said promise, it shall not be presumed to be made in performance of the promise, without direct proof of that purpose." In *Griffin v. Stanhope*, *Cro. Car.* 454, a lease

[ 58 ]

(a) *Stra.* 236.

executed after marriage, in pursuance of a promise before, was held good : and in *Sir Ralph Bovie's* case, 1 Vent. 198, there is a *dictum* to a similar effect.

1758.  
SPURGEON  
v.  
COLLIER.

*The Lord KEEPER.*

This bill is brought by the heirs of *P. Tubbing* the younger, for a redemption against Mr. *Collier*, Dr. *Alston*, and his son. Mr. *Collier* insists that he was a purchaser, and not liable to redemption. The other two defendants, that the estate was settled on the marriage of Dr. *Alston*, and therefore irredeemable in them, as they had no notice that *Collier* was redeemable.


Feb. 22.

How stands the case as to *Collier*? 18th April, 1735, *P. Tubbing*, the father, was in distressed circumstances, and seised of an estate of £70 *per annum*, subject to a mortgage of £1000. He had occasion for £200 more. *Collier* agrees to advance it, and takes a conveyance as an absolute purchaser, with the usual covenants, and particularly a covenant for further assurance. Was it intended to be sold according to the import and covenants of that conveyance? Nothing less. Mr. *Collier* executes a deed of defeasance, by which *Tubbing* is to redeem, during their joint lives, on payment of principal and lawful interest; and the mortgagor is to continue tenant, at £70 *per annum*, in the mean time.

[ 59 ]

The policy of this court is not more complete in any part of it than in its protection of mortgages : and, as a general rule for that purpose, a mortgage once redeemable continues so till some act is done afresh by the mortgagor to extinguish the redemption ; and a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. It would ruin the distressed and unwary, and give unconscionable advantage to greedy and designing persons.

It is said by the *Attorney-General* that this was a pur-

1758.  
  
 SPURGEON  
 v.  
 COLLIER.

[ 60 ]

chase *ab initio*; and yet he admits, that, during the joint lives, the land might have been redeemed on payment of principal and interest, and having an account of rent. But if in any case the redemption could have been confined to a period, yet I think in this case the conduct of the defendant would, in a court of equity, have rendered the right of redemption absolute, as *Collier* prevented his exercising the limited right stipulated for, by fraud, oppression, and imposition. For Mr. *Collier*, to prevent the redemption, corrupts the son to rob the father of the deed of defeasance (which was the foundation of it), and to put it into his hands; and he procures the man to be imprisoned, first in a gaol, and next illegally in *Carr's* house, to prevent his looking into his affairs. I have therefore no doubt that a redemption ought to be decreed as against *Collier* (a).

(a) The right of redemption is considered in equity as inseparably incident to a mortgage, and cannot be restrained by any clause or agreement whatever, it being a rule, that what was once a mortgage must always continue a mortgage. *Newcomb v. Bonham*, 1 *Vern.* 8. *Howard v. Harris*, *ib.* 33. 190. *Exton v. Greaves*, *ib.* 138. *Kilvington v. Gardner*, *ib.* 192. *Willet v. Winnell*, *ib.* 488. *Bowen v. Edwards*, 1 Ch. Ca. 222. *Jason v. Eyres*, 2 Ch. Ca. 33. *Manlove v. Ball*, 2 *Vern.* 84. *Jennings v. Ward*, *ib.* 520. *Croft v. Powell*, Com. Rep. 603.

*Vernon v. Bethell*, post. Vol. II. 110. In *Seton v. Slade*, 7 *Ves.* 273. Lord *Eldon* observes, that the doctrine of this court gives countenance to that strong declaration of Lord *Thurlow* (*Gregson v. Riddell*, 12 June, 1784, MSS.), that the agreement of the parties will not alter it.

A distinction, however, is observed where there is actually a new agreement between the parties. *Endsworth v. Griffith*, 15 *Vin.* 468. 2 *Eq. Ab.* 595. 5 *Bro. P. C. Ed. Toml.* 184. *Cotterell v. Purchase*, *For.* 61. Or where money is lent by one relation

As to the defendants, the *Alstons*, the question is, whether they come to this estate as purchasers, or under a voluntary conveyance.

\* Dr. *Alston* married Mr. *Collier's* niece on the 5th of *July*, 1751. Mr. *Collier*, on the 10th of *August* following, settles the estate in consideration of the marriage had. The deed is, on the face of it, merely voluntary, for it is after marriage, and on no new consideration paid. But it is said, that it was made in consideration of an agreement with the husband before marriage by parol; and that though a parol agreement will not support a suit since the Statute of Frauds, yet that it will operate so as to make a subsequent settlement, in consequence thereof, to proceed on a valuable consideration.

In the first place, here is no agreement, or promise proved. The witnesses speak of declarations only of Mr. *Collier*, that he had given his estate to his niece, as part of her portion, and though made in the presence, are not proved to have been in the hearing, of Dr. *Alston*. But before the Statute of Frauds, such a declaration would not, either at law; or in equity, have supported a suit, unless there had been shewn to have existed a reciprocity between the parties.

Secondly, if proved, it would not better the case. It is admitted, that, since the statute, though such promise

to another, with a proviso, that if the money is not settled on a certain day, the land shall be settled in a particular manner for the benefit of the family. *Bonham v. Newcomb*, 1 Eq. Ab. 312. *King v. Bromley*, 2 Eq. Ab. 595. Or where a defeasible or conditional purchase has been made,

subject to repurchase within a time limited. *Floyer v. Lavington*, 1 P. W. 268. *Mellor v. Lees*, 2 Atk. 494. *Tasburgh v. Echlin*, 2 Bro. P. C. 265. Ed. Toml. Though those cases seem to have been decided against the redemption, principally on the ground of length of time.

1758.  
SPURGEON  
v.  
COLLIER.  
[ \* 61 ]

1758  
 SPURGEON  
 v.  
 COLLIER.

[ 62 ]

was made, Dr. *Alston* could have no remedy. Then the settlement was voluntary, for it could not be compelled. It was made to a person having no right to demand it; for where there is no remedy, there is no right.

But, if such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit. For any man, on the marriage of a relation, might make such promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed, he would execute a settlement pursuant to his promise, and defraud all his creditors (a).

(a) It is noticed by Mr. *Sugden* (*Powers*, 426.), that the case of *Lavender v. Blakstone*, and the dictum in Sir *Ralph Bovie's* case, are both prior to the Statute of Frauds, and therefore cannot rule the point at this day. Nor does there appear to have existed any determination to warrant the dictum attributed to Lord *Macclesfield* in *Strange*. Sir *W. Grant*, in the case of *Randall v. Morgan*, 12 *Ves.* 74, expressed himself as follows, "There are dicta, that a settlement after marriage, reciting a parol agreement before marriage, is not fraudulent against creditors, provided the parol agreement had actual existence. But I do not know

that the point has been directly decided. It was discussed in *Dundas v. Dutens*, 1 *Ves. jun.* 196, but Lord *Thurlow*, though inclined that it should stand good, said it was a mere matter of curiosity, if the first point was against the plaintiff, as it was." Since the above observations, however, a report of the case of *Dundas v. Dutens* has been published by Mr. *Cox*, from which it appears that Lord *Thurlow* not only expressed a very decided opinion in favour of such settlement, but determined the case upon that point. He said, "That he could not conceive that a settlement made after marriage, in pursuance



I must therefore declare, that I am of opinion, that the deed of the 18th of *April*, 1735, and the defeasance, are to be considered as one instrument of mortgage, and that, no act having since been done to extinguish the equity of redemption, Mr. *Collier* is still liable to be redeemed, and that the settlement made the 10th of *August*, 1751, being made by Mr. *Collier* after the marriage of Dr. *Alston* with his niece, and not in pursuance of an agreement before marriage, or upon any valuable consideration, will not put Dr. *Alston* and his son in a better condition in this court than Mr. *Collier* was in.

Let the Master take the accounts, &c. and make allowances to the defendants for all lasting improvements.

of an agreement before marriage, though only parol, could ever be reckoned a fraudulent settlement; that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, had never gone such a length as that, and he was therefore clearly of opinion that the settlement was, in itself, valid." And his lordship dismissed the bill, observing, upon the *other* point, that, whenever it became necessary to consider that question, he should hesitate some time, &c. 2 *Cox*, 235. The

Court of K. B. were therefore correct, in *Shaw v. Jakeman*, 4 *East*, 207., in considering the point as having been determined by Lord *Thurlow*.

The point cannot yet be considered as fully at rest. Mr. *Sugden*, in some observations upon it, written probably before either Mr. *Cox's* note of *Dundas v. Dutens*, or the present case, were in print, argues most satisfactorily against the validity of such a settlement. And such will probably be the opinion of the courts upon the authority of the present decision.

1758.  
SPURGEON  
v.  
COLLIER.

1758.  
9th, 10th, & 15th  
March.

SALKELD v. VERNON.

SALKELD v. SALKELD.

(*Reg. Lib. B. 1757, fol. 557.*)

A release, *ex vi termini*, imports a knowledge in the releasor of what he releases, and, therefore, where executors (who had taken the opinion of counsel, which they had not communicated) obtained a release of the orphanage share from the husband of a freeman's daughter, they were decreed to account that the parties might elect, the length of time and alleged loss of vouchers being no sufficient bar to such account.

No opinion given as to the right of husband

to release the orphanage share of his wife, but court inclined to think he might.

Bequest to the children of testator's daughter, to the number of four, of the sum of £1000 each; if more, the £4000 to be divided between such as should be living at testator's death; but, if his daughter should die without issue, then over; a child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over, but an absolute legacy.

Bequest of the residue to his daughter, and her issue, and for want of such issue, over; the limitation over too remote, and therefore void.

*JAMES SMITH*, a freeman of *London*, upon the marriage of his daughter *Sarah* with *Peter Ruffe*, by articles bearing date the 31st of *December*, 1736, covenanted and agreed to advance £3000 to trustees, to be paid in manner following (that is to say), within one month after the marriage to pay to the said trustees £1000, and the further sum of £1000 within seven months then next following, and at the birth of the first child or children of the marriage £500, and at the birth of the next child or children, the further sum of £500, to be laid out in land, or government securities, to the use of the said *Peter Ruffe* for life, then to the use of *Sarah* for her jointure, but not in bar of dower, or her customary share, with remainder to the children of the marriage.

By his will, bearing date the 28th of *May*, 1737, *James Smith* devised (amongst other things) “ To his  
“ daughter, *Sarah Ruffe*'s child or children, to the num-  
“ ber of four, the sum of £1000 each, of lawful money  
“ of *Great Britain*, and if she should have a greater

“ number than four living at his decease, then he gave,  
 “ devised, and bequeathed, the sum of £4000 only, to  
 “ be divided among the said children that should be so  
 “ living at his decease, share and share alike, to be paid  
 “ them when they should attain their respective ages  
 “ of twenty-one years. And in case any of them die  
 “ before attaining that age, then his will was, that the  
 “ share or part of her, him, or them, so dying as afore-  
 “ said, should go to, and be given to, and equally be  
 “ divided among, the survivors or survivor of them. But  
 “ if his said daughter should happen to die without issue,  
 “ then, and in such case, he gave, devised, and be-  
 “ queathed the said sum of £4000 to his sister, *Mary*  
 “ *Barker*, and his nephew and niece, *James* and *Eliza-*  
 “ *beth Barker*, and the survivor of them. He also gave,  
 “ devised, and bequeathed the residue of his real and  
 “ personal estate to his said daughter *Sarah Ruffe*, and  
 “ her issue, and, for want of such issue, to his said  
 “ sister *Mary*, and his said nephew and niece, *Jane* and  
 “ *Elisabeth Barker*, and the survivor of them.”

He appointed his daughter, the plaintiff, executrix, and  
*Science* and *Masket* executors. Testator died *Septem-*  
*ber*, 1737. *Science* and *Masket* alone proved the will,  
 and acted under it, and collected the testator's effects to  
 a very considerable amount.

*March*, 1742, they took the opinion of counsel upon  
 the will, and were advised that Mr. and Mrs. *Ruffe* had  
 no right to the legacy of £4000; that Mr. *Ruffe*, in right  
 of his wife, was entitled to an account of her father's per-  
 sonal estate, in order to make his election; and they were  
 recommended to file a bill for the opinion of the court as  
 to the devise over of the residuum. This opinion the  
 executors never communicated either to the plaintiff or  
 her husband, but on the 1st of *April*, 1742, prevailed  
 upon them to execute a general release.

1758.  
 SALKELD  
 v.  
 VERNON.  
 SALKELD  
 v.  
 SALKELD.

1758.  
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 SALKELD
 v.
 VERNON.
 SALKELD
 v.
 SALKELD.

April, 1743, Peter Ruffe died without any issue by the plaintiff, and, by his will, made her executrix.

11th April, 1744, a new release was prepared by *Masket* and *Science*, and tendered by them to Mrs. *Ruffe*, which she was prevailed upon to execute, though no vouchers were tendered, or any information given her.

July, 1748, the plaintiffs intermarried, and had one son, who was afterwards the defendant in the second cause. Upon their marriage they applied to the executors to execute a declaration of trust, of a certain mortgage, and some annuities, the property of the testator, which was refused by them upon the ground of its having been devised over.

2d March, 1750, the plaintiffs filed their bill for an account against the representatives of *Science* (who had died) and *Masket*: the former pleaded the releases, which plea was ordered to stand for an answer (*a*); the latter submitted to account. After several proceedings in the cause, it came on to be heard, *3d May, 1754*, when it was ordered to stand over for a production of papers, and that the infant might be made a party.

The *Solicitor-General*, Mr. *Perrott*, and Mr. *Browning*, for Mr. and Mrs. *Salkeld*, contended, first, that Mr. *Ruffe*, the husband, had no right to give a release, and, if he had, the release was unduly obtained, and ought to be set aside; as to the claims under the will, it was said, that the limitation over of the £4000 was void, and sunk into the residuum, and that the limitation over of the residuum was also void, and that they were consequently absolutely entitled to both. Mr. *de Grey*, for the infant, contended, that the bequest of the £4000 was not confined to any particular children of the testator's daughter, and that the infant was therefore entitled to a share of it.

(*a*) Vid. *Salkeld v. Science*, 2 *Ves.* 107.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Simpson*, for the defendants.

It would be hard to make the defendants account at this distance of time, the bill not having been filed till 1750, and all the vouchers having been long since lost. Mr. *Ruffe* had the same power to release as his wife would have had, if she had been sole. The court cannot say that the money of the wife, coming after marriage, is not under the husband's control. This rule has but this exception: that where the husband applies to this court for the wife's fortune, the court will not lend him its assistance to get the money without a settlement, *Packer v. Windham*, Prec. Can. 412. *Phipps v. Sheldon*, 1 Eq. Ab. 64. But, where the husband does not want the aid of this court, it will not interfere. The orphanage share is a *chose* in action, and over terms of years the husband cannot be restrained in exercise of legal rights, except in the case of a trust created by his own consent. Sir *E. Turner's* case, 1 *Vern.* 7. *Tudor v. Samyne*, 2 *Vern.* 271. There is no proof of any fraud; the husband must have known of his right to elect, and might waive it, if he chose. If a husband wants the aid of the court, and he has not made a sufficient settlement, this court will put terms on him. The husband alone had a power to discharge it; therefore it is a good release, if not unfairly obtained.

1758.
SALKELD
v.
VERNON.
SALKELD
v.
SALKELD.

The Lord KEEPER.

The first question is, whether the releases, or either of them, are bars to the plaintiff's account prayed? And that will depend upon the manner in which those releases were obtained. Now a release *ex vi termini* imports a knowledge in the releasor of what he releases, unless upon a particular and solemn composition for peace per-

15th March.

1758.

SALKELD

v.

VERNON.

SALKELD

v.

SALKELD.

sons expressly agree to release uncertain demands (a). Now, here is no evidence of any account of the personal estate given by the acting executors, though the answer alleges there was one, and undertakes to prove it. I must, then, take it as a release, without an account of what the personal estate was from the acting executors. For *de non existentibus et non apparentibus eadem est ratio*.

But it is said I must not presume Mr. *Ruffe* had no account. I cannot presume one way or another, but I think it a necessary ingredient to support the release; and he who sets up the release must prove it. But in this case it is impossible for me to presume that Mr. *Ruffe* had one. For I think the release proves negatively there was none. The release was drawn by an attorney plainly for the benefit of the releasee; and the mention of a settled account could not have been omitted if there had been one. Therefore it is not reciprocal. The executors may set up demands against the residuary legatee. To that Mr. *Wilbraham* said, "so they should; and, if there had been a settled account, the executors might have come against the residuary legatees for any omissions by mistake." It is true; and the remedy would have been reciprocal; for the residuary legatee might have come against the executors on the like ground. But here being no such account, if a bill is brought for any thing not accounted, the executors may and do plead the release; but if the executors were to bring a bill, to refund, against the residuary legatees, they have no such plea.

(a) See Lord *Hardwicke's* cited by Sir *W. Grant* in observations in *Ramsden v. Lord Cholmondeley v. Lord Hylton*, 2 *Ves.* 310., and in *Clinton*, 2 *Meriv.* 353., and *Cole v. Gibson*, 1 *Ves.* 507.; Lord *Braybroke v. Inskip*, 8 see also *Fairwell v. Coker*, *Ves.* 417.

But, in the next place, no rule is better established than that every deed obtained on *suggestio falsi*, or *suppressio veri*, is an imposition in a court of conscience.

Now, Mr. *Ruffe*, *in jure uxoris*, had two demands upon his father-in-law's estate, the one under the custom, the other under the will. And he had a right to be let into the state of his father's assets, and the testamentary disposition he had made, before he could make his election. And this release to the acting executors would operate, not only as a bar to the account of the *quantum*; but be a confirmation of the particular legacies. It was necessary for him to know how far his wife was interested under the will as a legatee, in order to determine which was his most prudent option.

The legacy of £4000 was an important article on this head, which, by the release, it is plain he apprehended was given to his wife and her children, at the same time the executors knew, or had the greatest reason to believe, she had no interest in it, for so they were advised by an eminent counsel. Must I presume the opinion was shewn to Mr. *Ruffe*? If I do, that presumption proves him a weak man; for then he overrules his counsel's opinion by his own. Besides, clear as is now made the question of the residuum, he was advised it was a question proper for the determination of the court. And that he had a right to such determination before he accepted the legacies. Yet, without that determination, he accepts the legacies.

Therefore this is, in my opinion, a material *suppressio veri*: a concealment by one party of what he knew from the other (a).

(a) Wherever one contracting party is ignorant of its rights, and that ignorance is taken advantage of by the other, equity will relieve. *Jarvis v. Duke*, 1 Vern. 19. *Gee v. Spencer*, ib. 32. *Broderick v. Broderick*, 4 Vin.

1758.

SALKELD
v.
VERNON.
SALKELD
v.
SALKELD.

1758.

SALKELD

v.

VERNON.

SALKELD

v.

SALKELD.

It cannot be said that this was the common equity of the court, and that every body was presumed to know it. That argument was exploded in the case of *Pusey v. Desbouverie*, 3 P. W. 315.

As to the power of the husband to have made this option, I am inclined to think under this case he might, though I give no opinion upon it.

The next objection to the account is length of time and difficulty of accounting, by reason of the loss of vouchers. The length of time is but five years, for I consider both releases as obtained unduly. There is no evidence of any vouchers delivered up; and if a person obtaining an undue release, and such as cannot be supported in a court of conscience, could be admitted to bar an account by his own destruction of vouchers, I should, by that means, be encouraging him to double hatch his fraud.

I am therefore of opinion, that neither the releases, nor length of time, nor the want of vouchers, are a bar to the plaintiff's account.

The next consideration will be upon the different rights or claims under the settlement or the will of Mr. *Smith*. The first is of the two sums of £500, covenanted to be paid on contingencies which never happened, and which are claimed merely from not attending to the words of relation that run through the settlement.

The next is, who are entitled to the £4000? I do not find that the plaintiffs claim any part of it at the

Ab. 534. 1 P. W. 239. <i>Pusey</i>	S. C. 1 Cox, 333. <i>Alden v.</i>
<i>v. Desbouverie</i> , 3 P. W. 315.	<i>Gregory</i> , post. Vol. II. 280.
<i>Cocking v. Pratt</i> , 1 Ves. 400.	<i>Bowles v. Stewart</i> , 1 Sch. &
<i>Scrope v. Offley</i> , 1 Bro. P. C.	<i>Lef.</i> 209. <i>Murray v. Palmer</i> ,
Ed. Toml. 276. <i>Meade v.</i>	2 Sch. & <i>Lef.</i> 474. <i>East In-</i>
<i>Webb</i> , ib. 308. <i>Ramsden v.</i>	<i>dia Company v. Donald</i> , 9
<i>Hylton</i> , 2 Ves. 304. <i>Evans v.</i>	<i>Ves.</i> 275. <i>Leonard v. Leonard</i> ,
<i>Llewellyn</i> , 2 Bro. C. C. 150.	2 Ba. & Be. 184.

hearing by virtue of the devise of that legacy ; but they say, if no children, the limitation over was void, and it *falls into the residuum. The infant claims £1000 part of it, and consequential to that a like claim arises to any three children more of the plaintiffs.

I will first consider the claim on behalf of the infant. It is said the testator's intent was, if Mrs. *Ruffe* had but four children, born at any time, and begotten by any husband, they were to have £4000 each ; for instance, if she had two by Mr. *Ruffe*, born before the testator's death, and two by Mr. *Salkeld*, born after his death, they should have £1000 each ; but if Mr. *Salkeld* had a third child, his first two children were to forfeit £1000 each. Whimsical as this disposition is, if the disposition is so expressed, it must take effect ; but it can never be established upon construction.

But neither the words nor the subject matter will admit such exposition. A pecuniary legacy is seldom intended as a provision, but as a benevolence, and therefore it was natural for the testator to confine this to objects of his knowledge, and for which he had contracted an affection, the children living at his death. He was determined to provide for his daughter's family by his disposition of the residuum.—The words in syntax run thus: “ To my daughter *Sarah Ruffe*'s child or children, to the number of four living at my decease, I give and bequeath the sum of £1000 each ; and if she shall have a greater number than four, then I give and bequeath the sum of £4000 only, to be divided amongst the said children that shall be so living at my decease, &c.”—The quantum is restrained to £4000, the objects only to the children living at the testator's decease ; but then it is added, “ but if my daughter should happen to die without issue, that then and in such case, &c.” and on these words it is said the limitation over, after a general

1758.
SALKELD
v.
VERNON.
SALKELD
v.
SALKELD.
[*71]

1758.

SALKELD

v.

VERNON.

SALKELD

v.

SALKELD.

[* 72]

failure of issue, is too remote and void. And it is true, that whenever a particular estate is given in a chattel of the *duration of an estate tail, a limitation over is void; but this is not a limitation over by way of remainder, but an absolute legacy to the children, if they live to its vesting in them; if they do not, then to other persons. It is like the limitation of two fees-simple, to start at the same time upon different events, as in the case^o of *Luddington v. Kime*, 1 *Salk.* 224. Lord *Raym.* 203.

Now the devise of the residuum is the reverse, for that being intended as a provision, is given to the daughter and her general issue, and the limitation over on failure of general issue is in nature of a remainder; now her general issue could not take, but by vesting the residuum in the daughter, transmissible to her issue, and then the limitation over, on failure of issue, would tend to a perpetuity, and is void (a).

Let it be referred to the Master, to take an account of the debts and funeral expenses of the testator, and also an account of the personal estate come to the hands of the executors, and let the balance be divided into two equal moieties; and let the plaintiffs make their election whether they will take it under the custom of *London*, or the will of the testator. Let the Master take an account of the legacies given by the will of the testator, and let the same, in case plaintiff shall elect to take under the custom, be paid out of the testamentary part; but if they shall elect to take under the will, then let the debts be paid in a course of administration, &c.

(a) As to limitations over *Grey v. Montague*, *ib.* 339.
of personal estate, vide *Gray Destouches v. Walker*, *ib.* 261.
v. Shawne, *post.* 153. *Taylor* and *Bodens v. Lord Galway*,
v. Clarke, *post.* Vol. II. 202. *ib.* 297.

1898. 1 Ch. 347.

GRIFFITH v. SHEFFIELD.

March, 1758.

(Reg. Lib. A. 1756. fol. 238. (a))

JOHN, Duke of *Buckingham*, by will, bearing date the 9th of *August*, 1716, bequeathed to the plaintiff, *Charlotte*, the wife of the plaintiff *Griffith*, then the wife of *Dr. Walker*, two legacies of £1000 and £5000, charged upon his real estate, and devised all his real and personal estate to trustees, to be invested in lands, subject to several charges, in trust for the defendant, *Sir Charles Sheffield*, upon a contingency which afterwards happened. Several suits and cross suits were carried on between the defendant and the duke's heirs at law and executors, to which the plaintiff was a party. By an order made on the 9th of *June*, 1737, the defendant was directed to be let into possession of the trust estates, and it was ordered that a receiver should be appointed of an estate, called the *Lees* estate, which had been purchased with the personal estate, who should pay interest out of the rents of it for the several legacies, and to the plaintiff's interest; for the former of the two legacies at five, and for the latter at four per cent.

The parties being tired with litigation, the defendant, apprehending that he should be benefited by a sale of the *Lees* estate, wrote a letter, dated the 5th of *April*, 1752, to *Mrs. Griffith*, requesting her to join in a sale, in which he assured her that it could be no detriment to her in any respect, and would make the duke's estate worth £6000 more, enable him to settle his affairs, and pay off incumbrances, which he must do when her son *John* came to demand it; till when, if she thought it would be any loss to her, he would keep her money at the same interest

An undertaking contained in a letter from *A.* devisee of real estate to *B.* a legatee, to pay interest upon her legacy, which was charged upon the estate according to the rate fixed by an order of court, provided *B.* would join in a sale, held to be upon sufficient consideration, it appearing that several expensive suits, in which *A.* was engaged, would thereby be terminated, and the estate bettered; and such undertaking not being waived by no notice having been taken of it in a subsequent agreement to sell, a specific performance was decreed.

[74]

(a) This is the report of of the appeal in the register's the case as it came on at the book.

Rolls. There is no account

1758.

GRIFFITH
v.
SHEFFIELD.

it then was, as long as she pleased, and make good all damages she could possibly suffer.

By articles of agreement, bearing date the 23d of *June* 1752, it was agreed, that application should be made to the court for an order to sell the said *Lees* estate, and that all proper parties should join in such sale, and out of the purchase-money, the several legacies in the duke of *Buckingham's* will, and interest should be paid, and that the executors should pay the residue as the court should direct; and that the parties should consent to any order for payment of money, or transfer of stock to the defendant, and to any orders about the real estates. An order was accordingly obtained, and the estate sold; and afterwards, by a subsequent order, the sum of £6000, part of the purchase-money, was set apart to purchase *South Sea* annuities, and the interest thereon directed to be paid to the plaintiff. The interest arising from the *South Sea* annuities being much less than what was directed to be paid upon the legacies, by the order of the 9th of *June*, 1737, the plaintiffs filed this bill, to have the deficiency, which amounted to £50 15s. 10d. per annum, made good from the 20th of *November*, 1754, according to the undertaking of the defendant by his letter; and that he might continue to make good the deficiency of the said interest money, from time to time, as the same should become due.

The cause coming on at the *Rolls*, on the 27th *January* 1757, his Honour ordered, that the defendant should pay the interest of £1000 at five per cent, and £5000 at four per cent. pursuant to the undertaking in the letter of the 5th of *April*, 1752; and that the plaintiffs should be at liberty to apply for payment of the interest that should hereafter become due at that rate. This was an appeal from the above decree.

The *Attorney-General* and Mr. *Sewell* for the defendant.

There are two objections to the agreement: first, there is no sufficient consideration; second, supposing there were, yet it has been waived by the plaintiffs. The letter was only a proposal which was never accepted. Sir *Charles Sheffield* had an estate tail in all the duke's real and personal estate. He might have paid off the legacies whenever he pleased, and merged this estate. This is not therefore such a consideration as will uphold this agreement. When a court of equity directs an agreement to be carried into execution in specie, it will inquire whether the agreement is fair, reasonable, and certain. It is not an agreement mutual and on consideration. But secondly, there is no notice whatever taken of the letter in the articles. If it was the intention that the letter should be binding, why was there no agreement to that effect at the time of executing the articles? On the contrary, it is inconsistent with them. On the whole, the affair must be considered to have stopped with the proposal, and never to have come to an agreement.

1758.

 GRIFFITH
 v.
 SHEFFIELD.

Mr. *Perrot* and Mr. *Coxe* in support of the decree.

As to the validity of the agreement it can never be impugned by any arguments of the power of Sir *Charles* to merge the estate, as he expressly says in this letter, that her coming into the agreement will better the estate £6000, and that she is a necessary party to it. As to the point of consideration, it must be taken that Mrs. *Griffiths* had a right to an account of all the personal estate, and to have it laid out in land. Her joining in the articles put an end to all the suits. In family agreements the court will not weigh with great nicety the amount of considerations, vide *Cann v. Cann*, 1 P. W. 723. *Stapilton v. Stapilton* (a). It must also be remembered that these are his own proposals. He could not get rid of the receiver and the suits and expenses attending them with-

(a) 1 Atk. 6. As to this, vid. *Wycherley v. Wycherley*, post. Vol. II. 175.

1758.

GRIFFITH
v.
SHEFFIELD.

out her consent. If, therefore, it was upon a proper consideration, and was such an agreement as ought to be carried into execution, the remaining question is, whether it was waived? It was Sir *Charles Sheffield's* interest to invest this money, and no one else's. As long as she had a security for her interest, she was indifferent as to what became of it. She had, therefore, no occasion to produce the letter till the payment of the interest was disputed. She had nothing to do with the principal; that appointment was of course. She was only interested in the order as far as it directed the dividends to be paid to her.

The Lord KEEPER.

This bill was brought to have an account for the interest of two legacies, of £1000 and £5000, given to the plaintiff's wife by *John, Duke of Buckingham*, charged on his estate; and by decree of this court of the 9th of *June, 1737*, carrying interest at the rate of five and four *per cent.* respectively. And the defendant, who was entitled to the Duke of *Buckingham's* real and personal estate, was liable to the payment thereof; and, by an agreement of the 5th of *April, 1752*, it is said that Mr. *Sheffield* undertook to pay such interest.

Now, several objections are made to this agreement; first, that it was without consideration. But I think that Mrs. *Griffiths* joining in the articles, by which Mr. *Sheffield* was enabled to put an end to so many expensive suits and accounts (a), and to which she was a necessary party, and by which Mr. *Sheffield* judged his estate would be bettered £6000 was a very good consideration moving from her (b). And any proposal made with re-

(a) Lord *Hardwicke* observes, in *Penn v. Lord Baltimore*, 1 *Ves.* 444, that the settling boundaries and peace and quiet is a good consideration."

(b) *Stapilton v. Stapilton*, *cit. sup.*

ciprocal consideration, and accepted, and on one part executed, is, in my opinion, a conclusive agreement, and ought to be specifically executed. As in the case of *Tomlinson v. Gill*(a), where the consideration of admitting the father into the joint administration was held a conclusive and binding agreement, though by parol.

It was then said the agreement was waived, because no notice was taken of it in the articles. But I think the execution of the articles was so far from a waiver, that it was an acceptance of the proposal, and the conclusion of the agreement. Upon the whole, I see no reason to differ from the decree, but am of opinion that the same ought to be affirmed.

(a) *Amb.* 330.

CHOLMONDELEY v. MEYRICK.

(*Reg. Lib.* A. 1757. fol. 512. nom. *Cholmondeley v. Egerton.*)

By indentures of lease and release, bearing date the 19th and 20th of *July*, 1714, executed previous to the marriage of the plaintiff's late father, *Charles Cholmondeley*, with *Essex Pitt*, certain premises were conveyed to trustees and their heirs to the use of the said *Charles Cholmondeley* for life, remainder to trustees to preserve, &c. remainder, as to part, to the wife for her jointure, remainder of the whole to trustees for 99 years on trusts

marriage, to be paid immediately after the decease of the father; with survivorship in case of the death of a child before its portion should become *due and payable*. The father died without making any appointment: held, the portions vested at twenty-one or marriage during his life.

1758.

GRIFFITH
v.
SHEFFIELD.

19th and 21st
April, 1758.
S. C.
Cit. 3 *Bro. C. C.*
253. n.
Amb. MSS.
Coxe, MSS.
Hill, MSS.
Perryn, MSS.

Term to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or

1758.

CHOLMON-
DELEY

v.
MEYRICK.

determined, remainder to trustees for 300 years, for raising portions for younger children, remainder to the first and other sons of the marriage in tail male, with remainders over.


And it was thereby declared that the said term of 300 years was upon trust, that if there should be a son of the said *Charles Cholmondeley* on the body of *Essex*, his then intended wife, begotten, and also one or more daughter or daughters, younger son or sons, that then the said trustees should, out of the rents, issues, and profits, or by mortgage or sale, levy and raise such money for the portion of such daughter or daughters, younger son or sons, in such shares, proportions, and manner, and with such maintenances in the mean time as therein declared; that is to say, if there should be but one son, and only one daughter, then £5000 for the portion of such only daughter; and if there should be two such sons, and no daughter, then £3000 for the portion of such younger son; and if there should be an eldest or only son, and only two other children, then the sum of £6000 for the portion of such other two children (and other provisions were made in case of a greater number of children): the said several sums for the portion or portions of such daughter or daughters, and younger son or sons, to be raised and paid to him or them at such time or times; and in case there should happen to be more than one child besides an eldest son, then in such shares, and proportions, and manner, as the said *Charles Cholmondeley*, by any deed or writing, to be by him duly executed in the presence of two or more credible witnesses, or by will, should direct, limit, or appoint, and, for want of such appointment, to be equally divided amongst them, if more than one such daughter or younger son, share and share alike, and to be raised and paid in manner following (that is to say): to such younger son or sons at

twenty-one, and to the daughter and daughters at her or their respective ages of twenty-one, or days of marriage, which should respectively happen after the decease of the said *Charles Cholmondeley*; or in case any such daughter or daughters should attain twenty-one, or be married in the lifetime of the said *Charles Cholmondeley*, then to be paid immediately after the decease of the said *Charles Cholmondeley*, unless the same should have been raised and paid in his lifetime, which it might be by his direction. And it was thereby declared and provided, that in case any such daughter or daughters, younger son or younger sons, should die before his, her, or their portions should become due and payable, or be sooner paid as aforesaid, then the portion or portions of such of them so dying to go to and be paid amongst the survivor or survivors of them, when the original portion of such surviving daughter or daughters should become due and payable as aforesaid: provided that no surviving daughter or younger son should thereby have any greater portion than by the trust aforesaid is for him or her provided, in case such daughter or daughters, or younger son or sons, so dying, had not been born. Provided, that if all die before any of their portions should become payable, then the term to cease.

The issue of the marriage were one eldest son, the plaintiff, and five younger children, three of whom died young, in the lifetime of the father and mother: the two others were daughters, the elder of whom, *Jane*, married the defendant, *Meyrick*, and died in the lifetime of her father, leaving two children: the other daughter, *Mary*, married the defendant *Wannup*, and was a defendant in the present cause.

Charles Cholmondeley, the father, died in 1756, intestate, and without having made any appointment.

The plaintiff conceiving that Mrs. *Wannup* was injured

1758.

 CHOLMON-
 DELEY
 v.
 MEYRICK.

1758.
 ~~~~~  
 CHOLMON-  
 DELEY  
 v.  
 MEYRICK.


by the non-appointment of his father, by articles of agreement bearing date the 29th of *September*, 1756, reciting his father's marriage settlement, and that Mrs. *Meyrick* had died before her portion became payable; and that Mrs. *Wannup* thereby became entitled to £5000, and that Mrs. *Meyrick*'s children were entitled to nothing; and that he was unwilling to take advantage of his father's non-appointment, agreed to secure to Mrs. *Wannup* the sum of £1000 to make up the sum of £6000; and also the sum of £1000 to Mrs. *Meyrick*'s two children.

The bill prayed that it might be determined what sum should be raised under the 300 years' term, and whether *Meyrick* was entitled to any share of the £6000, or whether Mrs. *Wannup* was entitled to the whole; and, if £6000 was to be raised, that the articles might be declared void. The only point argued was between the co-defendants, whether Mrs. *Meyrick*, having died in her father's lifetime, was entitled to a moiety of the sum of £6000 provided for two children?

The *Attorney-General* and Mr. *Strickland* for the defendant *Meyrick*.

Mr. *Meyrick* claims to be entitled to £3000, as the moiety of £6000, raisable under the term of three hundred years, it having vested in his wife on her marriage. The present question arises upon a common clause in a settlement, for a portion to be raised out of land, which cannot vest, and be transmissible, till it is payable and raisable. Therefore the settlement fixes the time of twenty-one for sons, and twenty-one, or marriage, for daughters; that being the time when they want it. The settlement evidently provides that they may vest during the lifetime of the father: and, in order to prevent the inconvenience of raising them during his lifetime, the raising is expressly postponed till after his death. The inclination of the court is always in favour of vesting

portions. *Pitfield's Case*, 2 P. W. 513, and therefore Lord *Hardwicke*, in order to effectuate the general intent of the settlement, went against the express words, *Emperor v. Rolfe* (a). His lordship thought that it could never be the intention that a child, living till twenty-one, marrying, and having children, should, by dying in the parent's life, lose its portion. The words in the present case are, "due *or* payable," which are to the same effect with those which occurred in the settlement in *Emperor v. Rolfe*, and which are inserted for the benefit of the estate, not in favour of a surviving child. The words there were, "due *and* payable." It may, perhaps, be objected, that the portions are suspended, and prevented from being vested by the father's power of appointment. But suppose both daughters had married and died in the lifetime of their father, leaving families, should nothing be raised? and yet, in such case, there would have been no objects of appointment. *Conway v. Walpole*, Barn. Ch. Rep. 153.

1758.  
  
 CHOLMON-  
 DELEY  
 v.  
 MEYRICK.

The *Solicitor-General* and Mr. *Perrot* for the defendants, the *Wannups*.

The question, whether Mr. *Meyrick* is to take any part of the £6000, must depend on the words of the settlement. The power of appointment differs the present case very materially from *Emperor v. Rolfe*. As the number of children may vary, nothing certain can vest in any of them till appointment; and as the power of appointment may be exercised by will, the children, who are to take, cannot be determined till the father's death. The intention of the settlement is, that no children should be benefited, unless they survived, so as to be the object of appointment. And, though this provision may be very unusual and unreasonable, yet, if it be so ex-

(a) 1 *Ves.* 208.

1758.  
 ~~~~~  
 CHOLMON-
 DELEY
 v.
 MEYRICK.

pressed, the court must carry it into effect. The parties might have an inclination that the portion should not be raised to the prejudice of the estate, for the advantage of a deceased child. There was, therefore, no vested interest under this settlement, in any child that did not survive the father; *Mason v. Limberry*, Com. Rep. 451. *Maddison v. Andrews (a)*. *Davy v. Haoper*, 2 Vern. 655. *Wingrave v. Palgrave*, 1 P. W. 401. *Tournay v. Tournay*, Prec. Can. 290.

The Lord KEEPER.

April 21st.

This bill is brought by Mr. *Cholmondeley*, who has entered into articles to pay Mrs. *Wannup*, his sister, the defendant, £1000, to make up her fortune £6000, upon a supposition that Mrs. *Wannup* would be entitled to £5000 under the settlement of her father, as the single younger child, entitled to a portion under the three hundred years term.


Supposing she was the single younger child, she would be entitled to £5000 only; and therefore the question on this bill is, whether Mr. *Cholmondeley* has been imposed on or mistaken, so as to authorize me to set aside these articles. It is alleged, that Mr. *Cholmondeley* conceived, that, if his father had made an appointment, Mrs. *Wannup* would be entitled to £6000.

Now it seems very clear, that Mr. *Cholmondeley*, the father, could have no power to appoint in the case which Mr. *Cholmondeley*, the son, supposed; and therefore these articles being voluntary, and entered into upon a mistake and misapprehension, ought, without further question, to be set aside.

But the grounds of Mr. *Cholmondeley*'s relief seem to have been deserted, and the question proposed for me to

(a) 1 Ves. 57. 61.

determine is between the co-defendants, Mr. *Meyrick* and *the Wannups*; and the question is, whether, upon the trusts of the three hundred years term, Mr. *Meyrick's* wife was entitled to a moiety of £6000, provided for two children, or whether the whole £5000, only, is to be raised for Mrs. *Wannup*, Mrs. *Meyrick* dying in the lifetime of her father, and before her portion, by the trusts of the term, could be raised; and that question seems to me to be extremely plain, and easily solvable by common sense, and on the principles of obvious justice.

1758.

 CHOLMON-
 DELEY
 v.
 MEYRICK.

This term of three hundred years was created by the settlement for raising portions for younger children, according to the number that should be born of the marriage. If one, £5000; if two, £6000; if four, £8000; if five, £10,000; and the sums were certain according to the number of children that should be born, and entitled to their portions. But if more than one, in such shares and proportions as Mr. *Cholmondeley*, the father, should appoint, and, in default of appointment, equally to be divided, payable to the sons at twenty-one, or marriage: but if they attained twenty-one, or married in the father's lifetime, then the money to be raised and paid immediately after the father's death, when the term took effect in possession. But it is provided, that if any die before their portion becomes due and payable, or before it is sooner paid by the power the father reserved for that purpose, the portion of such child, so dying, shall go and be paid amongst the survivors, equally to be divided, when the original portion should become payable; provided that no surviving daughter or younger son should thereby have any greater portion than by the trusts aforesaid is for him or her provided, in case such daughter, or younger son, so dying, had not been born.

Now, upon this declaration, it cannot be disputed, that if there were two children born that lived till their

1758.
 ~~~~~  
 CHOLMON-  
 DELEY  
 v.  
 MEYRICK.

portions became due, they must have £6000 raised out of the estate, whether Mr. *Cholmondeley* was willing or not. He could only divide that £6000 between them, according to his discretion. It is as certain, that if five were born, and only two lived till their portions became due, they could have but £6000, though Mr. *Cholmondeley* had been willing to have given them more. Why? Because the burthen on the eldest son was settled by the marriage contract, and also the provision for the younger children, and nothing was left to his discretion, but to judge of, and reward the merit and behaviour of these younger children. There is no power reserved to him to deprive any younger child of his whole fortune.

Here a sum certain is provided according to the number of the children born ; unalterable as to the quantum, but alterable and defeasible *quoad* the respective proportions ; and by the clause of survivorship, if five had been born, and four had died before their portions became payable, the £10,000 would have vested and gone from the children dying to the survivor, had it not been for the restrictive clause, that they should take no more by survivorship than if the children dying had never been born.

The death of the father was the time when the legal term commenced, and would take effect in possession, and then the portions were to be raised ; but there was a vesting at twenty-one or marriage, with a power of appointment hanging over it. But we know that a power inserted in a settlement, and never executed, is as if there had been no power at all, and is an insignificant letter ; *Menxey v. Walker (a)*. In this case, the term vests at the death of Mr. *Cholmondeley*, the father, and the remainder-

(a) *For. 72, et vide Sugd. on Powers, 531, and cases cited there.*

man can never have it reassigned till the trusts of it are performed under the directions of this court.

These portions are made payable to the daughters at twenty-one or marriage, to the sons at twenty-one; the time when they might naturally be supposed to be most in want of them. This court has formerly gone so far as that, where the time has arrived, it has lent its aid to the trustees to raise the portions by a mortgage of the term in reversion, where there were no present ready fruits. This was in fact the true spirit of the settlement. But it was soon found that this was extremely inconvenient, by mangling estates, and making children disobedient; and therefore, unless it is expressly directed by the deed, this court says now the portion shall vest, but not be payable by anticipation, till the fund is ready for the payment and discharge of it. *Emperor v. Rolfe*.

It has been insisted, on the part of the defendant *Wannup*, that the power of appointment suspends any vesting during the father's lifetime, and consequently that as *Mrs. Meyrick* died in her father's lifetime, nothing vested in her that could be transmitted to her representatives (a).

If this doctrine should prevail, it would be attended with very extensive consequences. For these powers are inserted in settlements, with a view and design that they never should be executed; for every man wishes that his children may deserve equally, and these powers presuppose a vesting. Here the father has done nothing, but he designed all his younger children should be left to such provision as is carved out for them by the settlement; and as he has never executed the power of appointment therein reserved to him, it now stands as if

(a) Vide *Rooke v. Rooke*, post. where there was a similar power of appointment.

1758.

CHOLMON-  
DELEY  
v.  
MEYRICK.

1758.  
 ~~~~~  
 CHOLMON-
 DELEY
 v.
 MEYRICK.

there had been no such power; and upon the principles of this court, the doctrine laid down in *Emperor v. Rolfe* must be followed.

As to the cases of *Davy v. Hooper*, and *Wingrave v. Palgrave*, which were cited for the *Wannups*, they were cases of settlements of a sum of money for daughters under a particular description, and as they did not fall within that description, their representatives could not be entitled; but the present case is that of a portion vested with a power of appointment hanging over it, which has never been executed, and therefore I am of opinion, that the defendant *Meyrick* is entitled, as the personal representative of his deceased wife, to £3000, one moiety of £6000, provided by this settlement for the portions of the children, with interest, from the death of *Charles Cholmondeley*, the father.

It is now an established rule, that if portions are directed to be paid at twenty-one or marriage, followed by a clause, that if they attain these periods in the lifetime of the father, the portions shall not be paid till after his death, yet that clause will not prevent the vesting in the life of the father. "These clauses", as Lord *Rosslyn* observes (3 *Ves.* 54), "were framed to obviate the difficulty arising from the determinations that charged the reversion, by permitting interest to be carried on from

the age of twenty-one, though there was an estate for life. As soon as these clauses came forward, Lord *Hardwicke*, in *Emperor v. Rolfe*, put a just construction upon them." If the settlement indeed "clearly and unequivocally makes the right of the child to a provision, depend upon its surviving both, or either of its parents, a court of equity has no authority to control that disposition," per *M. R.* 3 *Ves. & Be.* 85. Vide also *Wingrave v. Palgrave*, 1 *P. W.* 401. *Hotckkin v. Humphrey*, 2

Mad. Rep. 65. But "the intention must direct me, and the cases authorize me to struggle with language." *Emperor v. Rolfe*, 1 *Ves.* 208, and the present case, have been followed in *Rooke v. Rooke*, *post.* Vol. II. 8. *Reynous v. Jeffreys*, *ib.* 365. and 6 *Bro. P. C. Ed. Toml.* 398. *Randall v. Metcalfe*, 3 *Bro. C. C. Ed. Toml.* 318. *Woodcock v. D. of Dorset*, 3 *Bro. P. C.* 569. *Willis v. Willis*, 3 *Ves.* 51. *Hope v. Ld. Clifden*, 6 *Ves.* 499. *Schenck v. Legh*, 9 *Ves.* 300. *Powis v. Burdett*, *ib.* 428. *King v. Hake*, *ib.* 438. *Bayard v. Smith*, 14 *Ves.* 470. *Howgrave v. Cartier*, 3 *Ves. & Be.* 79. *Perfect v. Lord Curzon*, 5 *Mad.* 442.

Mad. Rep. 65. But "the court looking upon it as a hard thing, to impute to a father* that he should mean a child having attained twenty-one, or come to marriageable years, and formed a family; yet because that child dies in his life, the descendants should have nothing, and feeling that not to be a probable intention in the parent, have thought themselves at liberty to manage the construction of the words, as they would not in the case of a stranger, upon a matter of contract, without any mixture of parental feeling." Per Lord Eldon, 6 *Ves.* 507; and his Lordship adds in another part of his judgment in the same case, "The natural

1758.

CHOLMON-
DELEY

v.

MEYRICK.

[* 87]

STANLEY v. LENNARD.

(*Reg. Lib. B.* 1757, fol. 273. nom. *Stanley v. Burrell*).

SIR SAMUEL LENNARD having two natural children, Samuel and Thomas Lennard, and no legitimate issue, by his will, bearing date the 26th of November, 1726, devised the premises in question to Sir R. Austin and

wards to permit A. to receive the rents and profits for his life, and, after his decease, to permit his eldest son, and the issue male of such eldest son, to receive, &c. and, for want of issue of A., to B., in like manner; and for want of issue of both, or if their issue should die without issue, then over: held, a trust estate, and that A. took an estate tail.

1758.

1st & 2d May,
S. C.

Amb. 355.

Perryn, MSS.
Sewell, MSS.

Devise to trustees to raise by mortgage, or lease, so much money as would pay testator's debts, and after-

1758.
 ~~~~~  
 STANLEY  
 v.  
 LENNARD.

*Peter Burrell*, and their heirs, upon this special trust and confidence, and his will was, the said trustees should raise, by mortgage or lease, so much money as would pay his debts and legacies, and afterwards permit and suffer *Samuel Lennard*, the eldest of his said children, to receive the rents and profits for the term of his natural life, and, after his decease, to permit and suffer the eldest son of the said *Samuel Lennard*, and the issue male of such eldest son of *Samuel*, to receive the same; and, for want of issue of the said *Samuel*, to permit his second son, *Thomas Lennard*, to receive the same for and during the term of his natural life, and, from and after his decease, to permit the eldest son of the said *Thomas* to receive the same to him and the heirs male of his body; and for want of issue of both his said children, or if their issue should die without issue, then to permit his sister, *Dorothy Lennard*, to receive the rents for her life, and, after her decease, to the first son of her body, and the heirs male of such first son, he and they taking the name of *Lennard*, and, for want of such issue, to permit his nephew, *Francis Leigh*, to receive the rents for his life, and, after his decease, to suffer his second son that should be living at the time the before-mentioned contingencies should happen, and the heirs male of his body, to take the rents, &c. and, for want of issue of the said second son, to suffer the next son of *Francis Leigh*, which is not his heir at law, to take the same, he taking the name of *Lennard*; and then came the following clauses:

“ My will and meaning always being, that I would have my estate go to such of my said nephew’s children, in succession, and always separated from him that is my said nephew’s heir and carries his name, that such child may take and bear my name, and for want of such issue, to the use of my own right heirs for ever.

“ I will that my son *Samuel* shall have the use of my

pictures for and during his natural life, and, after his decease, to his issue, and the issue of his issue ; and, for default of issue of *Samuel*, then to *Thomas* and his issue, in the same manner ; and, in default of such issue, then to my sister *Dorothy*, in such manner as I have given her my real estate."

1758.  
STANLEY  
v.  
LENNARD.

The testator died 23d of *October*, 1737; *Thomas Lennard*, *Dorothy Lennard*, and *Francis Leigh*, died without issue in the lifetime of *Samuel*. In 1749 *Samuel Lennard* died, leaving one daughter, the defendant, *Mary Lennard*, who claims an estate tail under the will.

The bill was brought by Sir *John Stanley*, as heir at law of the testator, to have a conveyance of the legal estate from *Burrell*, the surviving trustee, and for an account of the rents and profits from the death of *Samuel*.

The *Solicitor-General*, Mr. *Sewell*, and Mr. *Wilbraham*, for the plaintiff.

The only question is, whether, upon the construction of this will, the defendant, *Mary*, the daughter of *Samuel*, took an estate tail by implication. This is the devise of a trust, and not a legal estate ; the whole beneficial estate is given to the trustees and their heirs by mortgage or lease, to raise money to pay debts, and therefore they must have the whole fee in them to answer those purposes. *Shaw v. Weigh*, 1 Eq. Ab. 184. *Bagshaw v. Spencer* (a).

Courts of equity have always been more anxious to carry the intent of the party into execution in cases of trusts than of legal estates, and have made a distinction between trusts executed and trusts executory. But they have always been more strict where a testator has left something to be done, and has intended that the

[ 90 ]

(a) 2 Atk. 570. 583. 1 Ves. 142. 152. 1 Collect. Jurid. 378.

1758.

STANLEY

v.

LENNARD.

estate should afterwards be conveyed in a more accurate manner. But, supposing this to be the devise of a legal estate, yet there appears no intent in the testator to give an estate tail to the daughter of *Samuel Lennard*, but quite the contrary.

In order to find out the intention of the testator, it is proper to consider, first, the general intent, taken on the whole will collectively, and, secondly, the construction of the particular clauses in the will, from whence any implied intent of the testator, to give an estate tail to *Samuel Lennard*, can be collected.

First, as to the general intent. It is clear that the testator intended to preserve his estate in the male line, and to keep up a male succession in his family ; and that the devisees, under his will, should take the name of *Lennard*. In the devise to the second son of his nephew, *Francis Leigh*, he directs him to take the name of *Lennard*, and he expressly excludes the eldest, who would be entitled to the *Leigh* estate, and be inclinable to keep up that name. Taking the several clauses of the will together, there cannot be a stronger expression of an intent to preserve a male succession, by directing the devisees to take the name of *Lennard*, where he thought they would not inherit it from their father.

Secondly, as to the construction of the particular clauses of the will. To make estates arise by implication is not agreeable to the plainness of the common law, but has been admitted through necessity ; as, where a man, having a wife and two children, devises to the eldest son, after the decease of the wife, there the wife was held to have an estate for life by implication through necessity ; but, if the devise had been to the second son, in like manner, there would not have been such necessity, because the estate might have descended to the eldest son in the mean time, and therefore an estate for life could

not have arisen to the wife by implication. Now there are only two clauses in this will from whence any implied intent to give an estate tail to the first taker can be collected. The first words are, before the limitation to *Thomas, viz.* “And, for want of issue of the said *Samuel*, to permit,” &c. And the other words are, after the limitation to the first son of *Thomas, viz.* “And, for want of issue of both my said children, or, if their issue should die without issue, then,” &c. Now the question will be, what the testator meant by the word “issue”, and whether it is to be taken substantively or relatively? The testator’s intent was, that the entail should continue, and that his name should continue. And, therefore, the word “issue” ought not to be taken generally, but to mean such issue as the testator intended, *viz.* sons. For, if he had intended the daughters to take, he would have directed the husbands to take the name of *Lennard*.

The cases where persons omitted in wills have been taken in, have been in favour of sons and male issue only. As when only six sons were mentioned, and the rest omitted, the court has, to carry on the general intent of the testator, given an estate tail by implication. *Langley v. Baldwin*, 1 Eq. Ab. 185. *Attorney-General v. Sutton*, 1 P. W. 754. *Lethieullier v. Tracey*, 3 Atk. 728.

The case of *Blackborn v. Edgley*, 1 P. W. 40, was a devise to *Hewer Edgley* for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, remainder to his daughters in tail general, and if *Hewer Edgley* should die without issue, then remainder over. Here it was insisted that *Hewer Edgley*, by virtue of the words “if he die without issue”, should have an estate tail, for otherwise the daughters of his son could never take, which would be against the testator’s intention. But Lord *Macclesfield* held, here being a limit-

1758.

STANLEY  
v.  
LENNARD.

1758.  
 ~~~~~  
 STANLEY
 v.
 LENNARD.

ation upon *Hewer Edgley's* death to his sons, and after to his daughters, the following words "if he should die without issue," must be intended "if he should die without *such* issue;" and it did not appear that testator intended that *Hewer Edgley's* son's daughters should take. In that case the word "issue" was made use of generally, and the court construed it "such issue." The present case is much stronger than that of *Blackborn v. Edgley*, for there Lord *Macclesfield* argued from an intent not appearing that the son's daughters should take, but here is a manifest intention appearing to the contrary, for it would destroy that male succession which the testator was so anxiously providing for, and would exclude the testator's second son *Thomas*. The testator's intent therefore being so manifest, the court will insert the word "such," and confine the words to issue male.

The *Attorney-General* and Mr. *Perrot* for the defendant.

This is the case of an imperfect will, where the full intention of the testator is not expressed; and it is agreed on both sides that this imperfect will must be supplied. The question is, what estate is to arise by implication? and this will depend upon the intention of the testator expressed by his will.


It is attempted by the plaintiff to make this a trust estate. It were to be wished that there was some intelligible rule to distinguish between uses executed and trusts. An estate to trustees to pay debts, is only an estate *quousque*, as estates by *elegit*, &c. and on which a legal remainder may be limited. The case of *Bagshaw v. Spencer* was a devise to trustees to *sell* for payment of debts; on that Lord *Hardwicke* laid his finger; but here is only a power to lease or mortgage, which is but a temporary provision. But even considering all those

devises as trusts, what advantage can arise to the plaintiffs? for as to the question of intent it makes no difference whether it was a use or a trust.

The testator had two natural children, and it is very clear that he intended to prefer them before all the relations he had in the world, and therefore the court will in all parts of this will consider them as legitimate issue, and give the preference to them and their descendants before any of his legitimate relations. The testator has carried his intent into execution defectively, to be sure, and has not proceeded to give the estate to the second and other sons of *Samuel* or *Thomas*, but stops short at the first son and his issue, nor gives any express estate to the daughters, and therefore it is necessary to give *Samuel* an estate tail by implication, to effectuate the testator's intent. *Langley v. Baldwin*, 1 Eq. Ab. 185.

It is admitted on the other side that an estate in *Samuel Lennard*, the first taker, must be supplied in order to let in his second and other sons; but they insist it must only be an estate in tail male, and rely on the intention of the testator to preserve a male succession by directing his name to be taken. But in the devise to *Dorothy* his sister, which is the next to that to his children, he gives no direction as to the taking his name, and therefore, for a time at least, it is plain that the testator did not regard the estate continuing in his name.

The words out of which the estate tail is to be supplied, are for want of issue generally. There would have been the same intention in the testator to prefer the male issue, if the words "for want of such issue" had been expunged; yet no court of justice could have inserted another limitation, though they will supply words where there are words to supply them out of, because they expound only, and do not make persons' wills. But the testator in the present case has supplied words, viz. "For

1758.

STANLEY
 v.
LENNARD.

1758.

STANLEY
v.
LENNARD.

want of issue of *Samuel*,” and afterwards “for want of issue of both my said children,” or “if their issue should die without issue.” Here are words of limitation, and the next in remainder can never take till these contingencies happen. When is *Thomas* to take? On failure of issue of *Samuel*, “issue” generally, and *Thomas* can never take till then. The words of limitation will raise the express estate, and cannot be altered by the court. The clause respecting the pictures is a strong explanatory clause. He gives the use of his pictures to his son *Samuel* for life, and after his decease to his issue, and the issue of such issue; and afterwards he gives them to his sister *Dorothy*, in such manner as he had before given her his real estate. It is plain the testator never intended *Dorothy* should have the pictures whilst any of the descendants of his children, *Samuel* or *Thomas*, were living.

As to the cases cited of *Blackborn v. Edgley*, the *Attorney-General v. Sutton*, and *Lethieullier v. Tracey*, they had all of them the description of male issue annexed to them, when the first taker was to have an estate tail.

The Lord KEEPER.

2d May.

This is a question arising upon the construction of the will of Sir *Samuel Lennard*. In all these cases there is but one invariable rule; the intent of the testator collected from the will itself, and not conjectured. It is insisted on the part of the plaintiff that this is the case of a trust, and that this court uses a greater liberality of construction in the cases of trusts than of legal estates. I am of opinion that this is the case of a trust; and I found my opinion upon the two stats. of 1 R. 3. and 27 H. 8. But I do not think that that circumstance will vary the present case, because words declaring a trust must be ex-

pounded in this court as they would be at law; otherwise the properties of mankind would be precarious, there would be one judgment here and another at law, which would be mischievous. *Counden v. Clerk, Moor*, 860. *Hob.* 29. *Jenk. Cent.* 294.

1758.
STANLEY
v.
LENNARD.


The distinction between trusts executed and executory seems to be ill expressed; but, when properly taken, appears to have good sense in it. In all cases of the latter description something is left to the judgment of the trustees, and consequently of the court, which has to perform the office of counsel. And no inconvenience can be said to arise, because a court of law has no jurisdiction till the trust is carried into execution (a).

I am, then, to consider for what persons this trust is declared, and who the testator intended should successively take this estate. And I must make this construction as agreeably as I can to the rules of law and equity.

Every case upon wills stands upon its own circumstances, and former determinations are only of use to find out general principles to guide the judgment of the court in the construction of the will before them. The general question is, whether Sir *Samuel Lennard* only intended a male succession, or that the daughters of his eldest son, *Samuel*, should take prior to the limitation to his younger son, *Thomas*? This intent I must endeavour to find out from the first words preceding the limitation to *Thomas*, which are, “and for want of issue of the said *Samuel*.”

To consider the general effect of these words. Where a man, by his will, makes one tenant for life, with remainder to one, two, three, four, five, &c. of the issue of the tenant for life, and then, for want of issue of tenant for life, limits the estate over, this will be an estate tail in the first taker for life by necessary implication; and

(a) *Vid.* the next case but one.

1758.

 STANLEY
 v.
 LENNARD.


this, because of the word “ then ” before the limitation over, which, though sometimes an adverb of time, yet is sometimes a word of relation, and signifies as much as “ in such case,” and must have this effect, that upon the first, second, third, fourth, fifth, &c. limitations failing, the remainder-man could not take it, because of the words, for want of issue ; and therefore, unless the tenant for life was construed to have an estate tail, it would descend, in the mean time, to the heir at law, because the contingency on which the remainder-man was to take had not happened. But as the testator certainly intended to dispose of his whole estate, it has been construed a necessary implication, that the tenant for life should take an estate tail to carry the testator’s intent into execution. But where there is an express estate for life, the court never enlarges this estate for the sake of the tenant for life himself, but merely for the sake of other persons who are intended to take by the will. To this it is objected that you will introduce an estate tail, which will give the party an opportunity of defeating the limitations over : but this proves too much ; for so it happened in all the cases that have been cited at the bar ; for you cannot supply the defect and omission in the will without giving the tenant for life power to destroy the remainders over.

In the case of *Blackborn v. Edgley*, the words “ for want of issue ” must be taken for words of relation : for there was a provision for all the immediate sons and daughters of the tenants for life ; and there was no reason to think the testator intended to provide for granddaughters, especially when, by inserting the limitations contended for, the tenant for life might have destroyed the limitations for their benefit.

It has been said, that the words in the present case are not to be taken generally. The rule is *generaliter dictum, generaliter intelligendum*, unless there are words in

the will to restrain them. Now there are no such words in the present will; but then it is said I must do it from the intent of the testator, which was to establish a male succession, which was to bear his name. I do not collect from this will, that such was his intention, but quite the contrary. Wherever the males are to succeed they are to take his name, but he has given an estate for life to his sister *Dorothy*; with remainder to her first son, without any direction for her during her life to take the name; and further, the testator had a collection of pictures which he intended should go according to the limitation of his real estate before devised. "I will that my son *Samuel* shall have the use of my pictures for and during his natural life, and after his death to his issue, and the issue of such issue." Now it is clear he intended all the issue of *Samuel* should have the enjoyment of them; and yet he did not intend that any person should have them, but such as had his estate; for where he disposes of them to his sister *Dorothy*, he gives them her in such manner as he had before given her his real estate.

How can I say that I must not give an estate tail to *Samuel*? The words say so: the clause relating to the pictures confirms it; and if I say the contrary, I must say it by conjecture; where the plaintiff himself does not contend that the estate must have gone over to *Thomas* in preference to a second son of *Samuel*. That, they admit is not meant, but that *Samuel's* sons should all take an estate in tail male, and then the words should stop. This I cannot do, as it is inconsistent with the testator's will. For I must tie it up to the issue of *Samuel* for life, or else it would as effectually prevent the male succession, as by giving *Samuel* an estate in tail general, which I think the testator intended, and therefore this bill must be dismissed.

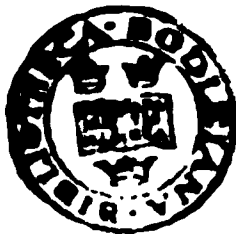
1758.

 STANLEY
 v.
 LENNARD.

1758.
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 STANLEY  
 v.  
 LENNARD.

The doctrine as laid down in *Doe d. Cock v. Cooper*, 1 *East*, 229, is, that wherever there is a general and a particular intent in a will, the latter must give way when the former cannot otherwise take effect; and therefore, though the court might best fulfil the *particular* intent, by giving the first taker only an estate for life; yet the *general* intent being, that all his issue should inherit the entire estate, before it goes over; that intent can only be effected by giving an estate tail by implication from the subsequent words, “in default, &c.”—This was particularly discussed in *Robinson v. Robinson*,

1 *Burr.* 38, where all the prior authorities are collected.

For subsequent cases, where this doctrine has been either adopted or alluded to, and recognized, *vide Evans d. Brooke v. Astley*, 3 *Burr.* 1570. *Roe d. Dodson v. Grew*, 2 *Wills.* 323. *Wilm.* 272. *Doe d. Blandford v. Applyn*, 4 *T. R.* 82. *Denn d. Webb v. Puckey*, 5 *T. R.* 299. *Doe d. Chandler v. Smith*, 7 *T. R.* 531. *Doe d. Cock v. Cooper*, 1 *East*, 229. *Pierson v. Vickers*, 5 *East*, 548. *Doe d. Strong v. Goff*, 11 *East*, 668. *Dansey v. Griffiths*, 4 *Maule and Selw.* 61. *Roe d. Thong v. Bedford*, *ib.* 362. *Gretton v. Haward*, 4 *Taun.* 94.



LOWTHER v. CAVENDISH.

(Reg. Lib. B. 1757, fol. 388.)

SIR JAMES LOWTHER being seised in fee of a large real estate, and possessed of leasehold estates in *Cumberland*, on which he had several coal and lead mines, many of which were working at his death, by his will, bearing date the 14th of *September* 1754, gave and devised all his manors, messuages, lands, tenements, mines of coal, lead, and all other mines, rectories, advowsons, tithes, rents, and hereditaments, whatsoever, situate, lying, and being within the county of *Cumberland*, with their and every of their rights, members, and appurtenances, except such as were thereafter otherwise disposed of, to the uses following, viz. to Sir *William Lowther* for life, remainder to trustees to preserve contingent remainders; remainder to the use of the first and other sons of Sir *William*, severally and successively in tail male; remainder to the use of *James Lowther* (afterwards Sir *James Lowther*, the plaintiff), in like manner, with remainders over. The testator also gave to Sir *William Lowther* all his ships, and shares of ships, and all horses and mares made use of at or about his collieries or coal mines, or in the management of his landed estate in the said county of *Cumberland*; and also all his sheep, cows, and other cattle; his plate, pictures, furniture, and household goods in or belonging to his houses at *Whitehaven*, or elsewhere, in the county of *Cumberland*; also all his debts for coals sold to ships, or any person or persons whatsoever; also

&c., laid down for making waggon ways, &c. for the better working of mines, &c. are fixed to the freehold, and go to the heir or remainder-man, or to the personal representative of the party erecting them.

1758.  
7th April, 5th,  
6th, & 27th May.  
S. C.  
Amb. 356.  
Sew. MSS.

Testator having both freehold and leasehold property, the leasehold was held to pass under a general devise, applicable to freehold, the intention of the testator being collected from the will, that it should pass under such devise.

Bequest of £30,000, South Sea Annuities, to trustees, in trust, to pay the dividends to *A.* until an exchange of certain lands shall be made between him and *B.*, and then the capital to be equally divided between them. *B.* dies before the time limited by the will for making the exchange expires: held, that *A.* is absolutely entitled to the whole legacy.

Reference to Master to inquire whether timber,

1758.

LOWTHER  
v.  
CAVENDISH.

all arrears of rent, and what else was due and owing to him in the county of *Cumberland*, except what was or should be owing or due to him on or by mortgages of estates, lands, houses, tenements, or hereditaments, or by deed or notes.

He then gave to Sir *William*, in trust, £10,000 of his *Old South Sea* annuities, of the second subscription, in order for him thereout, or by sale thereof, to pay and discharge the several legacies of £1000 each, or of any less sum given by the testator in his said will, or which should be given by him by any subsequent will or codicil, to any person or persons, or for any use whatsoever: and he gave to the plaintiff, Sir *James Lowther*, an annuity, or rent-charge, of £1000, charged upon his lands, collieries, and hereditaments in the manor of *Saint Bees*, in the county of *Cumberland*, during his life, subject to be determined as thereafter mentioned.

The testator then expressed himself as follows: “ And whereas I did not think it proper to divide my estate in *Cumberland*, but rather to dispose of it in the manner I have done, as it is an estate that requires great application and care in those that are to have the management of it, I think it would be right for Sir *William Lowther* aforesaid to have all the estate which the said *James Lowther* has in *Cumberland*, and that the said *James Lowther* should have all the estate which the said Sir *William Lowther* has in *Yorkshire*. It is my will, and I do hereby give and devise £30,000 of my *South Sea* annuities, commonly called *New South Sea* annuities, of the second subscription, to the said *James Lowther*, Sir *William Lowther*, and *Robert Harper*, of *Lincoln's Inn*, in the county of *Middlesex*, Esq., in trust for the said *James Lowther*, to have and receive all the dividends growing due thereon, until such time as the said Sir *William Lowther* shall, by absolute and effectual

conveyances in the law, make over to, and vest in, the said *James Lowther* and his heirs, all the lands, tenements, and hereditaments, which he, the said *Sir William Lowther*, is owner of, or has a right at present to be possessed of at *Maske*, or within twenty miles thereof, in the county of *York*, he, the said *James Lowther*, conveying also by good and effectual deeds and assurances in the law, to the said *Sir William Lowther* and his heirs, all his lands, tenements, and hereditaments, which he is at present for ever owner of, or has a right or title to have in the county of *Cumberland*, he, the said *James Lowther*, releasing also to the said *Sir William Lowther* all his right and title to the rent-charge hereinbefore given him of £1000 *per annum* for his life, charged upon and made payable out of my estate in the manor of *Saint Bees*: and it is my will, and I do hereby declare and direct, that, in case, by the neglect or refusal of either of them, the said *Sir William Lowther*, or *James Lowther*, what I have here recommended and directed is not made good and completed within six months after the said *James Lowther* comes to the age of twenty-one years, such one of them two, by whose neglect or refusal it shall appear not to have been completed, shall not, after that time, have any share of the said £30,000 of the *New South Sea* annuities, but the whole of the said £30,000 *New South Sea* annuities, shall belong to, and be the sole property of such one of them two, who was willing and ready to have completed and made effectual what I have recommended to be done by them: and, further, it is my will, that, in case what I have hereinbefore recommended is made good and completed by the said *Sir William Lowther* and *James Lowther*, the said £30,000 *New South Sea* annuities, shall be equally divided between them, and that each shall have £15,000 of it.

“ And whereas I am owner of, and have a property and interest in several burgage houses, and parcels of land in

1758.

LOWTHER  
v.  
CAVENDISH.

1758.

LOWTHER  
v.  
CAVENDISH.

*Cockermouth*, in the county of *Cumberland*, it is my will that they shall not be entailed as my other estates in *Cumberland*, but that they shall be held by the person that succeeds me in my estate at *Whitehaven*, in the same manner as I held them myself. And, therefore, I do hereby give and devise all my burgage houses, ground, and land at *Cockermouth*, and all my right, title, and interest therein, to the said Sir *William Lowther* and his heirs."

The testator then devised all his securities, &c., and the lease of a house in *Queen's Square*; and, lastly, all his goods, chattels, and personal estate, not otherwise disposed of, to Sir *William Lowther*, whom he appointed sole executor of his said will.

The testator's estates in *Cumberland* consisted both of estates of inheritance, and of collieries and lands held under sixteen different leases from various persons. Sir *William Lowther* died before the exchange could be made, as the plaintiff was still an infant, leaving the defendant, Lord *Charles Cavendish*, his executor and residuary legatee.

The bill prayed that possession might be delivered up of the leasehold messuages, lands, mines, collieries, and tenements, late the estate of the said Sir *James Lowther*; and also all fire-engines, horse-gins, waggon-ways, or staiths belonging thereto, and to account for the rents and profits since the death of Sir *William*, to have deeds delivered up, and that the defendants might assign and transfer all the testator's *South Sea* annuities and stock, except £10,000, of which Sir *William* was possessed at his death.

The *Solicitor-General*, Mr. *Perrot*, Mr. *Browning*, and Mr. *Sewell*, for the plaintiff.

Three questions arise for the opinion of the court upon the construction of this will: first, whether the leasehold estate passed under the general devise to the plaintiff?



Secondly, whether the plaintiff has become entitled to the legacy of £30,000 *South Sea* annuities? And, thirdly, whether the waggon-ways, staiths, and fire-engines, pass along with the land?

1758.  
 ~~~~~  
 LOWTHER
 v.
 CAVENDISH.

Where the court can collect from the will that it was the intent of the testator to pass his leasehold as well as his freehold property, the leasehold is passed accordingly. It was here evidently the intention of Sir *James*, that his collieries, though leasehold, should be settled and entailed along with his other estates in *Cumberland*. This is plain from the introduction of that clause in his will which is in the following words: "I do not think proper to divide my estate in *Cumberland*." The executor, by taking the collieries, will divide the estate, and raise a rival to his heir in the trade. Sir *James* intended to make one complete estate in *Yorkshire*, and another complete estate in *Cumberland*. Suppose a man devised all his houses, gardens, lands, tenements, and hereditaments, and his garden happened to be part freehold and part leasehold, the leasehold would undoubtedly pass, the intent would be so apparent that the testator did not intend a garden to be cut in two. The rule, indeed, laid down in *Rose v. Bartlett*, *Cro. Car.* 293., is, that, where a testator has both freehold and leasehold, and has used words applicable to estates of inheritance, the lands of inheritance only pass; but this construction may be controlled by a clear expression of intention. If there are no freehold lands, the leasehold will pass in order to effectuate the intent, *Day v. Trig*, 1 *P. W.* 286. In *Addis v. Clement*, 2 *P. W.* 458, the court took advantage of very slight words, in order to effectuate it: the words there were, "all the lands which the testator was seised or possessed of, or interested in:" a similar construction was adopted in the case of *Whitaker v. Ambler*,

1758.

LOWTHER
v.
CAVENDISH.

lately decided at the *Rolls* (a). In the present case there are several strong grounds for inferring the testator's intent. There are many other words in the will besides lands and tenements. He has shewn an intent to bequeath every thing specifically away. He has used the words "all his collieries," which, being all leasehold, are by themselves as strong as the words "possessed of and interested in," which were relied upon in *Addis v. Clement*. He has used the word "rents," and afterwards devises all his stock and arrears of rent.

As to the £30,000 *South Sea* annuities, it is a present vested devise to the plaintiff until the exchange was made or refused; till that time the plaintiff had as great an interest in it as if no condition had been annexed to it; and, as that event has never happened, the limited legacy has become absolute; it was given as a bounty to the plaintiff, but to Sir *William* it was only *coercendi causâ*, and therefore he must show something meritorious to deserve it; so that, as to him, the exchange was a condition precedent to vest an interest, and till such time as the condition was performed, he was entitled to nothing. But supposing the event which had happened to be a case omitted, in which neither party could be entitled by virtue of the clause relative to the exchange, yet it could not fall into the residuum, the testator having severed his *South Sea* stock, and *South Sea* annuities, from the gross fund of that residuum, and devised them to the plaintiff, with an exception only of such as he had thereinbefore given away. But if it is to be considered as a case omitted, in which the devise cannot take effect, or the plaintiff's right is to be considered as having ceased from the moment it became impossible, still they

(a) *Vide* this case, *post.* p. 151. reversed upon appeal.

cannot be considered as given away or disposed of, and consequently, according to the testator's meaning, not excepted out of the general devise.

1758.
LOWTHER
v.
CAVENDISH.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Hoskins* for the defendants.

The words of devise comprehend no more than several different species of real property, in which the leaseholds are not comprehended, and they consequently must go to the residuary legatee. The general rule ever since *Rose v. Bartlett* has been, that a devise of lands, tenements, and hereditaments, will not carry leaseholds, unless there is no freehold estate. And particularly, whenever a man gives by words particularly applicable to his real estate, with real limitations, these leaseholds will not pass. In the case of *Day v. Trig*, 1 *P. Wms.* 286, where a testator devised all his freehold houses, though in fact he had but leasehold, it was held that they should pass; but that was from the necessity of the case, for if there had been any freehold houses to satisfy the will, the leasehold would not have passed. In the present will the limitations used are all limitations of real estate; there are tenants for life, clauses without impeachment of waste, of trustees to preserve contingent remainders, and there are tenants in tail. It is remarkable, too, that there is no provision for the renewal of the leases: there is not a single word that can have any propriety of application to leasehold estates; therefore the case of *Addis v. Clement* is, in fact, an authority with us: for there "possessed of" was a legal technical term to express the ownership of leasehold property. Suppose the testator had forgot this leasehold property, can there be any doubt but that in that case the residuary legatee would be entitled?

As to the £30,000 *South Sea* annuities, Sir *William Lowther* claims it as a lapsed legacy; the plaintiff insists that it was vested, and never divested. The object

1758.

LOWTHER

v.

CAVENDISH.

of the whole clause was to attain an exchange if both lived; and that sum of £30,000 was taken out of the testator's general *South Sea* annuities in order to procure such exchange, and for no other purpose. The sense of the clause is, that it shall remain as a deposit, subject to a future contingent vesting of the whole, and the produce be paid Sir *James* till the event. He disposed of it in the cases of an exchange actually made, or if neglected or refused, but in no other case. The accident that happened of Sir *William's* death, was, from the improbability of it, *casus omissus*. How could the testator have intended this to go in an event which he could not have in contemplation? There is at least nothing to shew that he intended the plaintiff to have the absolute right. The general rule therefore must operate, that legacies so failing shall accrue to, and become part of the residuum, by force merely of the residuary clause, without any further declaration of the testator's intention that it shall be so; though it may be conjectured that if the testator had attended to the particular case which afterwards happened, he might have ordered it otherwise. As to the objection that the plaintiff, till the event happened, had as great an interest as if no condition had been annexed, it is a mistake. The clause makes the future vesting as conditional upon the plaintiff as upon Sir *William*, as he could not take it without performing the like condition on his part. If at the time of performance Sir *William* had refused, and the plaintiff been willing to perform the condition, the plaintiff would then only have acquired his first title to the £30,000, and must have claimed by virtue of two circumstances, 1st. His own compliance; 2dly, Sir *William's* refusal; which shews that he must have done something as well as Sir *William*. If both had neglected during the six months, neither could have claimed the legacy, as being equally culpable;

and yet if the plaintiff's interest could be no otherwise defeated than by an actual exchange or tender from Sir *William*, the plaintiff would still be entitled to the whole, notwithstanding he had forfeited his share by his own wilful neglect. The gift of the profits was not a gift of the capital, but only a temporary disposition of the produce, to wait upon the devise of the capital. The legacy was equally coercive, and equally bountiful to both. As to the notion of a specific residue, it ought to be clearly made out where a general residue is given; as it is unnatural to suppose that a testator should create two funds of this nature to interfere with each other. Here the testator has neither described this particular residue by name, nor excepted it out of the devise of the general residue.

1758.

LOWTHER
v.
CAVENDISH.

The Lord KEEPER.

Upon this bill three questions have been made, which are questions of construction upon the will of old Sir *James Lowther*.

27th May.

The first question is, whether the several leasehold estates of which the testator was possessed, or any of them, are entailed as far as they may by law, together with the real estates in the county of *Cumberland*; or whether they passed by the residuary clause to Sir *William Lowther*, or came to him as executor. And I shall consider this question as if it were depending between Lord *Charles Cavendish*, the personal representative of Sir *William*, and a son of Sir *William*, who would have been the first remainder-man under Sir *James Lowther's* will; and shall therefore endeavour to collect from the words and penning of that will what he intended to entail, and what he intended to pass by the residuary clause. I shall therefore first consider the clause con-

1758.

LOWTHER

v.

CAVENDISH.

cerning the burgage tenures, and see how far it is a key to the rest of the will.

“ And whereas I am owner of, and have a property
 “ and interest in several burgage houses and parcels of
 “ land in *Cockermouth*, in the county of *Cumberland*,
 “ it is my will that they shall not be entailed as my other
 “ estates in *Cumberland*, but that they shall be held by
 “ the person that succeeds me in my estate at *White-*
 “ *haven* in the same manner as I held them myself. And
 “ therefore I do hereby give and devise all my burgage
 “ houses, ground and land at *Cockermouth*, and all my
 “ right, title and interest therein to the said Sir *William*
 “ *Lowther* and his heirs.” It appears to me from hence,
 that the testator thought he had entailed before in his
 will all his other estates in the county of *Cumberland*,
 and that these alone were to pass to the devisee with as
 ample an interest as the testator enjoyed in them. For the
 word *estates* being a general word, I must so understand
 it; nothing in the context determining the meaning to
 any species of estates.

The defendants, however, insist, that by the first devise
 in the will, the testator devised no lands to the devisee
 but such wherein he was seised of an estate of inheritance.
 The words are, “ manors, messuages, lands, tenements,
 “ mines of coal, lead, and all other mines, rectories, ad-
 “ vowsons, tithes, rents, and hereditaments whatsoever,
 “ situate, lying, and being within the county of *Cumber-*
 “ *land*, with their and every of their rights, members, and
 “ appurtenances, except such as are hereinafter otherwise
 “ disposed of.” And upon this ground, that the words
 lands and tenements properly relate only to estates of
 inheritance, and will not pass a chattel interest, but *ex*
necessitate where the testator has no freehold lands.

It is observable that in order to assume this ground on

which they build their argument, they drop many significant words in this devising clause ; and then they fix their position on the authority of the case of *Bartlett v. Rose*, *Cro. Car.* 293, where it is said that all the justices, *absente Richardson*, resolved, that if a man have lands in fee, and lands for years, and devises all his lands and tenements, the fee-simple lands pass only, and not the lease for years. And if a man hath a lease for years, and no fee-simple, and devises all his lands and tenements, the lease for years passes, for otherwise the will would be merely void.

1758.
LOWTHER
v.
CAVENDISH,

This resolution of the judges in the precise case put may be law ; but there is no striking force in it, for it would be difficult to assign any reason why lands and tenements should not include leases for years. And it does not appear by the report that the case required that resolution. For the case on the special verdict was no more than this: *Richard Battine* was possessed of a lease for years of some, and seised in fee of other lands in *Burnham* : he willed his wife should have *Burnham's*, and the lands thereto belonging, being three acres and a half in *Lentfield*, *durante viduitate*, and willed and bequeathed to his wife all the rest of his lands lying in the parishes of *Burnham* and *Hitcham* during her life, and afterwards to his son *Bartholomew*. The residue of his personal estate he gave to his wife, and made her executrix. Now, as it did not appear that *Battine* had any other lands in *Burnham* than *Burnham's*, and the lands thereto belonging in *Lentfield*, the leaseholds must have passed for the same reason as if he had had nothing but leasehold ; for otherwise the rest of the will would have been void. But the judges supposed the fact, that there were other freehold lands to satisfy the second devise ; whereas, it was reasonable to have concluded, according to the principle that *de non apparentibus et non existentibus eadem est*

1758.

LOWTHER
v.
CAVENDISH.

ratio: or, perhaps more properly, have awarded a *reventre facias de novo* (a).

But, however, any other words in the same will, indicating a more extensive intent in the testator, will vary the construction. And, therefore, in the case of *Addis v. Clement*, 1 P. W. 456, upon a devise of all his lands and tenements in the parish of D—, which he then stood seised or possessed of, or any ways interested in, to several persons in a succession of particular estates and remainders, my Lord King said, I must own the limitations are improper (viz. for leasehold estates); but then the words of the will are very strong. All the lands which the testator was possessed of, or interested in, properly refer to leasehold estates, and distinguish the present case from that of *Rose v. Bartlett*. Though, in that case,

(a) Lord Eldon has twice observed (2 Bos. & Pul. 315, and 6 Ves. 640,) that it was difficult to believe that Lord Northington ever made use of the expressions respecting the case of *Rose v. Bartlett*, which are attributed to him in the report of this case in *Ambler*. "He was a great lawyer," adds his Lordship, "and very firm in delivering his opinion; and if he dissented from *Rose v. Bartlett*, I rather think he would in a firm and manly way have denied that case to be law, than thrown out such an observation." The above is, however, from Lord Northington's

own hand-writing, and agrees with the note of the case in the *Sewell* papers. It is remarkable that Mr. Baron Eyre, in speaking of *Rose v. Bartlett*, should also have treated it with similar disrespect, though he did not venture to contradict it. 1 Bro. C. C. 78.

The authority of *Lowther v. Cavendish* has, however, never been questioned. Lord Eldon has observed, that it was "a case of exception to the general rule on the obvious intention of the testator." 2 Bos. & Pul. 315, *vid.* note at the end of the case,

it was observed that those words were equally applicable to a trust interest in the freehold, and are words put in by the scrivener *currente calamo*.

Now, it seems to me that the testator's declaration, that he had entailed all his other estates in *Cumberland*, except his burgage tenures, is a much stronger evidence of his intent to have comprised the leasehold in the general devising words, than those words "possessed of and interested in" were in the case of *Addis v. Clement*.

I have said this upon the supposition that the devising words were confined to "lands and tenements". But here are other words that seem material to pass, that is, the words "rents and mines of coals". The testator expressly devises all his rents in *Cumberland*: how can the devisee have all the rents, if those of the leaseholds go to the executor?

But what principally determines me upon this point is, that of the leaseholds, consisting of the number of sixteen, the greater part are demised by the description of coal-mines or collieries, others by the description of levels; and the rest, from their locality, appear to be taken as conveniences intended to be appurtenant to the mines. And it was a great defect to bring this cause to hearing without a production of the several leases; for it is more than probable the reason of taking those leases would appear from the body of them.

But, however, I will next consider whether the testator intended these leaseholds to pass by the residuary clause, or by constitution of an executor.

It is observable, that throughout the will the testator seems anxious to devise specifically every part of his property. The estate in *Cumberland* is devised by the very general words which I have mentioned. The estate in

1758.

LOWTHER

v.

CAVENDISH.

1758.

LOWTHER
v.
CAVENDISH.

Westmoreland by the very same words (a). And, therefore, if Sir *William Lowther* is entitled, by the executorship or residuary clause, to the leaseholds in *Cumberland*, he must, by the same reasoning and construction, be entitled to leaseholds in *Westmoreland*.

He then gives certain pecuniary legacies: and afterward devises to Sir *William Lowther* all his ships and share of ships, all his horses and mares made use of or employed at or about his collieries or coal-mines, or otherwise in the management of his landed estate in *Cumberland*; also all his sheep, cows, and other cattle; his plate, pictures, furniture, and household goods in or belonging to his house at *Whitehaven* or elsewhere in *Cumberland*; also all his debts for coals sold to ships, or any person or person whatsoever; also all arrears of rent, and what else is owing to him in *Cumberland*, except what is or shall be owing or due to him on or by mortgages of estate, lands, houses, tenements, or hereditaments, or by deed or notes. Then he gives other pecuniary legacies, and the £30,000 *South Sea* annuities, of which I shall take no notice on this head. Then he gives to Sir *James Lowther* his securities, his house in *Queen Square*, held for a term of years; and, lastly, he devises all his goods, chattels and personal estate, not otherwise disposed of, to Sir *William Lowther*, whom he makes residuary legatee and executor. Now, it would be pretty strange to suppose that Sir *James Lowther* had devised the rents of his leasehold estates, the arrears of such rents, and the stock upon them specifically, and had left the estates themselves not specifically devised.

(a) This appears to be an error; as there is no mention either in the Register's book, or in any of the reports of the case, of any other estate, than the *Cumberland* estate.

Therefore I am of opinion that the leaseholds passed by this will entailed with the other lands to Sir *William Lowther*, and not by the residuary clause or the constituting him executor (a).

1758.
LOWTHER
v.
CAVENDISH.

The second question, which relates to the £30,000 *South Sea* annuities, depends upon another part of the will. "And whereas I did not think it proper for me to divide my estate in *Cumberland*, but rather to dispose of it in the manner I have done, as it is an estate that requires great application and care in those that are to have the management of it, I think it right for the said Sir *William Lowther* to have all the estate that the said *James Lowther* has in *Cumberland*, and that the said *James Lowther* should have all the estate of the said Sir *William Lowther* in *Yorkshire*. It is my will, and I do

(a) The rule of law laid down in *Rose v. Bartlett* has been often recognized and acted upon, and is not to be shaken. *Davis v. Gibbs*, 3 P. W. 26, Fitzg. 116. *Knotsford v. Gardner*, 2 Atk. 450. *Chapman v. Hart*, 1 Ves. 271. *Whitaker v. Ambler*, post. 151. *Pistol v. Riccardson*, 2 P. W. 459. n. 1 H. B. 26. n. *Thompson v. Lady Lawley*, 2 Bos. & Pul. 303. *Watkins v. Lea*, 6 Ves. 633. It is a rule, however, "founded on intention;" and therefore, where judges could collect that the intention of the testator was that both freehold and leasehold should pass, they have so determined. *Addis v. Clement*, 2 P. W. 456. *Lowther v. Cavendish*. *Turner v. Husler*, 1 Bro. 78. *Lane v. Lord Stanhope*, 6 T. R. 345. *Dixon v. Dawson*, 2 S. & S. 327. As to the effect of this doctrine with regard to devises of copyholds, vid. *Doe v. Earl of Lucan*, 9 East, 448. *Blunt v. Clitherow*, 10 Ves. 589. *Church v. Mundy*, 12 Ves. 426. & 15 Ves. 396. *Judd v. Pratt*, 13 Ves. 168. & 15 Ves. 390. *Sampson v. Sampson*, 2 Ves. & Be. 337. *Strutt v. Finch*, 2 S. & S. 229. *Oxenforth v. Camkwell*, ib. 558.

1758.

LOWTHER
v.
CAVENDISH.

hereby give and devise £30,000 *South Sea* annuities to the said *James Lowther*, Sir *William Lowther*, and *Robert Harper*, in trust for the said *James Lowther*, until such time as the said Sir *William Lowther* shall, by absolute and effectual conveyances, make over to and vest in the said *James Lowther* and his heirs, all his lands, tenements, and hereditaments, at or within twenty miles of *Marsh*, he the said *James Lowther* conveying to the said Sir *William Lowther* all his right and title to the rent-charge hereinbefore given him of £1000 *per annum* for his life out of my estate at *St. Bees*. And it is my will, that in case, by the neglect or refusal of either of the said Sir *William Lowther* or *James Lowther*, what I have here recommended and directed is not made good and completed, within six months after the said *James Lowther* comes to the age of twenty-one, such one of them two, by whose neglect or refusal it shall appear not to have been completed, shall not, after that time, have any share of the said £30,000 *South Sea* annuities; but the whole of the said £30,000 *South Sea* annuities shall be the sole property of such one of them two who was willing and ready to have completed and made effectual what I have recommended. And, further, it is my will, that, in case what I have recommended is made good and completed by the said Sir *William Lowther* and *James Lowther*, the said £30,000 *South Sea* annuities shall be equally divided between them; and that each shall have £15,000 of it."

In the first place it is to be observed, that this is the devise of a chattel, bearing fruit to Sir *James Lowther*, and two trustees, upon trust for Sir *James*, to have the fruit *quousque*.—That is, in construction of law, a devise to him of the chattel *quousque*.—When is the devise to him to cease in point of limitation?—When Sir *William Lowther* shall convey to Sir *James* his *Yorkshire* estate.—Till that event happens, Sir *James* has as great an interest

in this money as if no limitation had been added to the devise; just as a man that has a qualified or conditional fee, has as great, and as ample an estate, as he that has a fee-simple, though his estate is not so perdurable, so pure, or so absolute. The same event must determine the total interest in these annuities as to Sir *James*, and precede the vesting of any part of them in Sir *William*. The event is a condition subsequent to limit one interest and a condition precedent to the accruing of the other. Is there any thing subsequent in the will that controls this express intent? There seems to be no event on which the £30,000 is to be divided, but this: Sir *William* was to purchase the moiety of the £30,000, and the rent-charge of £1000 *per annum*, by exchanging the estate; but if he was willing to exchange, and Sir *James* refused or neglected to complete the exchange, on that event the whole was to go to Sir *William*. Sir *James* has not neglected or refused, and consequently can have forfeited nothing. The exchange becomes impossible by the act of God, and by that the qualified legacy becomes absolute. Suppose I give the dividends of my £10,000 Bank stock to *I. S.* till *I. N.* returns to *England*, or till *I. N.* marries; and *I. N.* dies. Is not the legacy absolute? There seems to me throughout the will, not to be the most distant hint of an intent in the testator to have given any part of his *South Sea* annuities to Sir *William Lowther*, but upon his doing somewhat to merit it. It is not expressed as a *legatum benevolentiae*, but as a *legatum coercendi causâ*, which has ever been a very common method of purchasing a boon, that the testator makes an object after his death.

Legacies of this kind are given on condition, adeemed on condition, and transferred on condition, in order to obtain the end of the testator. They were indeed repro-

1758.

LOWTHER
v.
CAVENDISH.


1758.
 ~~~~~  
 LOWTHER  
 v.  
 CAVENDISH.

bated as legacies *nomine pænæ* by the old Roman law, but permitted when that law was corrected into purity, and have been allowed ever since. “*Pænæ quoque nomine inutiliter antea legabatur, et adimebatur, vel transferbatur. Pænæ autem nomine legari videtur, quod coercendi hæredis causâ relinquitur, quo magis aliquid faciat, aut non faciat, &c.—Sed hujusmodi scrupulositas nobis non placuit, et generaliter ea quæ relinquuntur, licet pænæ nomine fuerint relictæ, vel adempta, vel in alium translata, nihil distare a cæteris legatis constituimus, vel in dando, vel in adimendo, vel in transferendo: exceptis videlicet iis quæ impossibilia, vel legibus interdicta, aut alias probrosa. Hujusmodi enim testamentorum dispositiones valere, secta meorum temporum non patitur.*” (a)

The sense of this is, that by the old Roman law, if any legacy was given from an heir to a legatee upon condition, or in order to compel the heir to do, or to restrain him from doing, any particular thing, such legacy was deemed to be given *nomine pænæ*, and void. This was very irrational, for *cujus est dare, ejus est disponere*. Justinian therefore corrects the law, and says such legacies shall stand on the ground of other legacies, unless the condition be impossible, prohibited at law, or infamous. However, the best comment on this passage and species of legacies, is Mr. Swinburn, 4 pt. sec. 6. fo. 229. When the condition is extreme, that is to say, either necessary or impossible, such condition hindereth not the legatary, but that he may recover the legacy; but (fo. 223), that impossibility is with this limitation. When the condition is not impossible at first, but becomes impossible afterwards, for then it is not void, but makes the disposition void.

(a) *Just. Inst. Lib. 2, Tit. 20, sub finem.*

*E. g.* the testator gives *A. B.* £100 if he marry his daughter; afterwards, and before the marriage, the woman dies, whereby the condition is made impossible. In this case the condition, though now impossible, is not void, but makes the disposition void.

1758.  
  
 LOWTHER  
 v.  
 CAVENDISH.

These rules annexed to conditional legacies seem established on great authority, and founded on good sense. For if I annex a condition to a legacy, impossible at the time of imposing it, the legacy can never take effect, consequently it is repugnant, as if I give *A.* £100 *si mare ebiberit, si cælum digito attigerit*; but if I give a legacy upon a possible event, that is not repugnant to the nature of the gift, but only goes in restriction of the testator's benevolence; and no person has a right to impose a measure upon the testator's generosity, or to say that the condition imposed is whimsical or capricious.

The next consideration is, how are these rules applicable to the present case? Nothing can be clearer to me, than that this is a legacy *coercendi causâ*. It is a mean to attain an end. Sir *James* recites that he did not think it proper to divide his *Cumberland* estate, and intended to procure a further acquisition to the proprietor of it. What are the means he uses for that purpose? He gives £30,000 *South Sea* annuities to trustees, to pay the dividends to Sir *James Lowther*: had he stopped here, no doubt could have been entertained but that Sir *James* would have been entitled to this £30,000. But then he adds a conditional word *quousque* Sir *William* convey his *Yorkshire* estate; and in case such conveyance is made, the £30,000 shall be divided, and each shall have £15,000. Now the event upon which Sir *William Lowther* was to have the £15,000 was possible—it is become impossible. How then can he be entitled to this legacy? It is in effect no more than a description of

1758.

LOWTHER  
v.  
CAVENDISH.

the legatee. I give to Sir *William* (he having conveyed the *Yorkshire* estate to Sir *James*) £15,000.

I must therefore declare, that I am of opinion that the several leasehold parts of the *Cumberland* estate were devised by the will of Sir *James Lowther* to Sir *William* for life, with remainder over, as in the will, and that on the death of Sir *William Lowther* without issue, they are become vested in the plaintiff, Sir *James Lowther*, according to the limitations of the real estate in old Sir *James's* will.

And that the plaintiff, Sir *James Lowther*, is entitled to the £30,000 *South Sea* annuities, and decree, that the defendant *Harper* may join in a sale or transfer of the said *South Sea* annuities, to and for the sole and absolute benefit of the plaintiff.

And as to the third question, let it be referred to the Master, to inquire whether the timber and other materials laid down for making waggon-ways more commodious for carrying coal or other minerals from coal or other mines; and also fire-engines placed for the better working of such mines, are deemed and reputed in the county of *Cumberland*, and other counties in the north, fixed to the freehold, and pass therewith to the heir or remainderman, or go to the executor or administrator of the party erecting the same.

No costs.

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There was an appeal to the *House of Lords* from so much of the above decree as related to the legacy of the *South Sea* annuities, when the same was affirmed, 6th March, 1759, 3 Bro. P. C. Ed. Toml. 186.



WRIGHT v. PEARSON (a).

(Reg. Lib. B. 1757. fol. 507.)

30th & 31st May,  
6th June, 1758.

S. C.

Amb. 358.

Fearne, C.R. 126.

Hill, MSS.

Perryn, MSS.

HENRY RAYNEY, by his will bearing date the 2d of May, 1727, devised his estate at *Darsfield* and *Royston*, in the county of *York*, to *George Wright* and *Joseph Bateman*, and their heirs and assigns for ever, in trust, out of the rents, issues, and profit, to raise £500, with interest, to be equally divided between his five grandchildren, and to be paid to them respectively at twenty-one, with benefit of survivorship; and subject thereto, to the use of his nephew, *Thomas Rayney*, son of his sister, *Frances Rayney*, and his assigns, for and during the term of his natural life, subject to his qualifying himself as hereinafter mentioned, remainder to trustees to support contingent remainders, remainder to the use of the heirs male of the body of the said *Thomas Rayney*, lawfully to be begotten, and their heirs: provided, that in case his said nephew, *Thomas Rayney*, should die without leaving any issue male of his body living at his death, then and in such case he subjected the premises to the payment of £100 each to his two nieces, *Frances* and *Priscilla Rayney*, daughters of his said sister, if then living, payable at twenty-one, with benefit of survivorship; and he enabled his said trustees, after the death of his said nephew, to raise and pay the same: and for default of such

The same construction ought to be put upon words of limitation in cases of trusts and of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees; and therefore a devise of a trust was held to be an estate tail, from the apparent intent of the testator, and the general words of the will, though there was a limitation to trustees to preserve contingent remainders, a reference to issue male living at the time of the decease of the devisee, a restriction of failure of issue male to the lifetime of persons in esse, and a limitation in fee annexed to the words "heirs of the body."

(a) Mr. *Fearne* has observed upon this case, that "a stronger could scarcely be imagined, scarcely wished for, by the most zealous assertors of the rule", in *Shelley's case*, C. R. 133.

1758.  
WRIGHT  
v.  
PEARSON.

issue male of his said nephew *Thomas Rayney*, then as to all the premises subject to the payment of the said sums of £500 and £200, in manner and upon the contingency aforesaid, to the use of all and every his said five grandchildren, or such of them as should be living at the time of failure of issue male of the said *Thomas Rayney*, to take as tenants in common, and to their respective heirs and assigns, equally to be divided between them, share and share alike. The proviso was, that his said nephew, *Thomas Rayney*, should, immediately after the testator's death, be placed out apprentice to some eminent surgeon, or some other good trade, for seven years, and continue so long, or else reside in some college in *Cambridge*, there to reside till qualified to be a clergyman, and should be ordained; and in case he should refuse or neglect to be put out and continue such apprenticeship, or qualifying himself to be ordained a clergyman, he directed that the estate so limited as aforesaid to his nephew *Thomas Rayney* for life, should, from the time of such his refusal, cease, determine, and be void, as if he had been dead; and, in such case, the premises so limited to his nephew for life and his issue male as aforesaid, should go over, revert, and remain to such of his said five grandchildren as should be then living, equally, and to their heirs as tenants in common.

*Thomas Rayney* entered into the premises after the death of the testator, and suffered a recovery of them to the use of himself in fee. In 1748 he died, leaving his two sisters his heirs at law.

The bill prayed to have £500 raised out of the estate of *Thomas Rayney*, and to have a conveyance of the estate itself to the plaintiffs. It charged that *Thomas Rayney* took only an estate for life in the premises, and could not suffer a recovery of them.

The *Attorney-General*, Mr. Sewell, Mr. Wilbraham, and Mr. Ambler, for the plaintiffs.


1758.

WRIGHT  
v.  
PEARSON.

The general intent in the present case is clear to give an estate for life to *Thomas Rayney*, with remainder to his issue in fee. The testator's intent, if it does not break in upon any of the rules of law, may make words to be either words of limitation or purchase, *ad arbitrium*, *Backhouse v. Wells*, 1 Eq. Ab. 184. First, there is an express estate for life, which, though not sufficient of itself to control the operation of the rule, yet marks the intent of the testator, and joined with other circumstances, is of great weight. Next, there is a provision for trustees to support contingent remainders, which shews the intent of the testator, that *Thomas Rayney* should take a forfeitable estate. Great stress was laid upon this point by Lord *Hardwicke* in the case of *Bagshaw v. Spencer* (a), and it is observable, that in *Garth v. Baldwin* (b), where he decreed that it was an estate tail, there was no clause of this nature. The limitation to the heirs male of his body, has superadded words after the words of limitation, which according to the authority of the *Archers'* case, 1 Co. 66, *Lisle v. Gray*, 2 Lev. 223, *Raym.* 278: *Walker v. Snow*, *Palm.* 359, and other cases proceeding upon the same principle, convert the former into words of purchase, though, in themselves, proper words of limitation. The subsequent proviso gives strength to this construction by using the expression, if he shall die without leaving any issue male living at the time of his death; and lastly, in the clause of forfeiture, he refers to the estate of *Thomas Rayney* as an estate for life, and uses the word issue for the preceding words *heirs male*. It is like *Lodington v. Kime*, where the subsequent limitation to the issue male was held to be a contingent fee.

(a) 2 Atk. 570. 1 Ves. 142. 1 Collect. Jurid. 878.

(b) 2 Ves. 646.

1758.  
  
 WRIGHT  
 v.  
 PEARSON.

This is an executory trust, in which the courts have gone great length in effectuating the intention of a testator against the operation of the rule.

Mr. *Perrot*, Mr. *de Grey*, and Mr. *Clarke*, for the defendants.

The devise is improperly considered as a trust; it is executed by the statute. A legal devise to trustees *quousque* is a chattel interest, *Cro. Elix.* 315. *Cordal's case*, *Carter v. Barnardiston*, 1 *P. W.* 505. *Hitchens v. Hitchens*, 2 *Vern.* 403. The trustees have no legal estate, but only a power to raise the charge, which this court must invest them with. The clear intention of the testator is, that as long as *Thomas Rayney* had issue male, that issue should have the estate, which is inconsistent with the supposed limitation in fee. The will is not so clear as to overrule the operation of law on the words. The rule is, where a man takes an estate, and there is a limitation to his heirs in the same instrument, they are words of limitation, and not of purchase. The argument from the limitation to trustees to support contingent remainders, was overruled in *Coulson v. Coulson* (a). Next, as to the limitation of the fee. In *Archer's case*, 1 *Co.* 66, and in *Clarke v. Day, Moor*, 593, the word of limitation, upon which the superadded words were grafted, was in the singular number, and that was the principal ingredient in those cases. In *Shelley's case*, 1 *Co.* 93, the words heirs male of the body of such heirs male being engrafted on the previous limitation to the heirs male of the body of *Edward Shelley*, did not make them words of purchase, and in *Minshull v. Minshull* (b), Lord *Hardwicke* held, that the subsequent words of limitation will not affect the preceding words, unless the word *heir* is used in the singular number. As to the words "in default of issue," or, "if he die without issue," &c. it has been long held that they

(a) 2 *Atk.* 246.

(b) 1 *Atk.* 413.

give an estate tail. *Sonday's case*, 9 Co. 127. *Lewis Bowles's case*, 11 Co. 80. *Langley v. Baldwin*, 1 Eq. Ab. 185. *Attorney-General v. Sutton*, 1 P. W. 754.

1758.  
WRIGHT  
v.  
PEARSON.

*The Lord KEEPER.*

The question is, Whether *Thomas Rayney* took under this will an estate for life, or an estate tail? and that question produces a second, Whether it plainly appears that the heirs of the body of *Thomas* should take as purchasers, an estate in fee, or by limitation and from their father, an estate tail? But, previously to found the exposition of the will, another question is made, Whether the estate is remaining in the trustees, or executed by the Statute of Uses?

And to make it executed, it is said the trustees had only a chattel interest *quousque* the debts are paid; and that, subject to that chattel, this estate is executed in *Thomas*, with remainders over. *Carter v. Barnardiston*, 1 P. W. 505, has been quoted for this purpose. In that case Sir *Michael Armine*, 30th March, 1668, devised, that in case his personal estate should not be sufficient to pay his debts and legacies, then his executors should receive the profits of his whole real estate for the payment of his debts and legacies; and after these should be paid, he devised, &c. The Lords, with the advice of the judges, were of opinion that the executors had only a chattel interest; and *Hitchens v. Hitchens*, 2 Vern. 403, is to the same effect.

But these cases do not, in my opinion, apply to the present, and warrant the conclusion; for in these two cases the estate devised was an uncertain interest, and therefore a chattel. But whenever a certain express interest is devised, I conceive it not to be in the power of this court, by construction, to make the devise pass any other interest than is expressed. For instance, a man

1758.

WRIGHT  
v.  
PEARSON.

devises his lands and tenements to *J. S.* for twenty years for the payment of his debts and legacies only, and after payment thereof to *J. B.* and his heirs. After payment, this court will declare the term to be a trust for *J. B.* and to be assigned accordingly; but the court cannot declare that the term determined with payment. So if it had been a devise to *J. S.* for life, the court cannot make it a chattel, much less can it be done in case of a devise in fee; for such construction would change the trustees contrary to the testator's intent. The testator intended that the devisee and his heir should execute the trust; can the court say no, we will transfer it to the executors?

In the case of *Earl Bath*, reported by the name of *Bosworth v. Farrand, Carter 97, William, Earl Bath*, had, by fine and deed to lead the uses, limited lands to the use of *Francis, Lord Russel*, and others, trustees, and their heirs after the death of the earl, to raise for the daughters of *Lord Fitzwarren* £4000 a-piece. The question in that case was, whether those lands were within a power of jointuring. *Bridgman, C. J.*, in giving his judgment, fo. 107, says thus: "I shall not need to prove the whole fee-simple limited to the trustees, till the portions raised, though he that argued first seemed to be of opinion that all was but a chattel; but it is clear it is a fee-simple. If land be conveyed to the use of *A.* and *B.* and their heirs till £1000 be raised, it is a fee-simple conditional." I must not construe the will in that sense, for then I should make the remainders over void, as nothing can be limited after a fee; but I must take it as a devise to trustees of a pure fee, subject to divers trusts for divers persons. That reasoning was confirmed by *Lord Hardwicke*, in *Bagshaw v. Spencer*, though indeed there was in that case the additional circumstance that the trustees might sell.

This question seems to me not very material, because

I am of opinion that a limitation in trust, perfected and declared by a testator, must have the same construction as the devise of an estate executed; and to hold a contrary opinion would make property very precarious and uncertain. The testator would mean one thing in this court, and the direct contrary on the other side of the Hall. There is a distinction where the limitations are imperfect, and something is left to be done by the trustees in the first place, and consequently secondarily by this court. But Lord *Hardwicke* relied more on the intent of the testator, in *Bagshaw v. Spencer*, than on that distinction; but, however, I shall give my thoughts upon this point, and therefore declare that I am of opinion that this estate is not executed by the statute of uses, because I think that all trusts were not executed by that statute, but only such as were held by trustees for the immediate use of another, and not where the trustees were to perform a trust themselves, subject to which trust others were to have the benefit of the estate (a).

This brings me to the second, but principal question, whether the heirs male of *Thomas Rayney* took a fee as purchaser, or in tail, under the limitations to the father? The testator is here disinheriting his heir for the sake of preserving his name; yet it is supposed that after the limitation to *Thomas Rayney* for life, he has given it to the first son of *Thomas Rayney* in fee, without any regard to the succession of the estate, or the preservation of the name. But what is more contradictory to the testator's intending to give a fee to the heirs of the body of *Thomas Rayney*, and shews that the testator intended manifestly only a particular estate, is, that he has limited a remainder on it; for on a general failure of issue male of *Thomas Rayney*, he has limited the re-

(a) *Vide ante*, page 36, and the note there.

1758.

WRIGHT  
v.  
PEARSON.

1758.

WRIGHT

v.

PEARSON.

mainder in fee to his five grandchildren. This is *cardo causæ*.

But to take away this objection, and the force of it, it is said, that the limitation to the grandchildren is upon the event of *Thomas Rayney* dying without issue living at the time of his death. The limitation of the estate is confessedly to the heirs of the body of *Thomas*, whether in fee or in tail. But there is added a proviso, that if *Thomas* died without having any issue male of his body living at the time of his death, then he charges the estate with the further sum of £200 for the benefit of his nieces. This proviso, collateral to the limitation, is improperly introduced, and breaks the thread of the limitation of the estate, which, after the insertion of the proviso, is again resumed; and for default of such issue male of his nephew *Thomas*, subject to the £500 and £200 on the contingency aforesaid, to the use of all and every the grandchildren, or such of them as should be living at the time of failure of issue male. From hence it is urged, that “for default of such issue male” relates to the issue male of *Thomas* living at his death, so as to make the limitation over to the grandchildren an executory devise; but I cannot think this a just construction to give the words applied to the limitation of the estate a relation to the collateral proviso, but the better construction is to postpone the collateral proviso, and then it would stand thus: To the trustees and their heirs to raise, &c.; then to *Thomas* for life, remainder to trustees to preserve contingent remainders; remainder to the heirs male of *Thomas* and their heirs; and for default of such issue, remainder to the five grandchildren and their heirs, as tenants in common. By this construction, the words “and for default, &c.” would refer to heirs male before mentioned, and the proviso would be detached, which seems to me to be the true and rational construction of the will; for it is absurd to con-



is true it to be limited to the issue male living, &c. ; but if the proviso is taken in a parenthesis, it gives the whole will a sense agreeable to the testator's intent.

The consideration of this question leads to a determination of the first. What estate is given by this will to *Thomas Rayney*?

It is very rightly admitted by counsel, that that must depend on the whole will ; and that the declaration of an express estate for life, may be controlled by the general words and disposition of the will. Nay, it must be admitted now to be so, though the first devising words had been negative, and given an estate for life only. The reason of this is, that testators attempt to annex qualities to estates which the law will not allow of ; they will give estates for life, meaning, that they should have descendible qualities with respect to the succession, wishing them to have restrictive qualities with respect to the first taker. In these cases, therefore, the court considers the substantial meaning.

I think the words " heirs male, &c." are indisputably, as collocated in this will, words of limitation, and not of purchase : for it is admitted on all hands, that the word " heirs " in the same will where the ancestor takes an estate for life, are words of limitation, and not of purchase. In the present case, if the will had stopped at those words, it is admitted by Mr. *Attorney-General*, that it would have been clearly, and by established precedent, an estate tail. *Shelley's case*, 1 Co. 93. *Rundale v. Eely, Carter*, 170. The case of *Colson v. Colson* (a) confirmed that, only it separated the estate tail from the estate for life by the interposition of trustees to preserve contingent remainders ; which seems a distinction without a difference.

But it is said to be manifestly distinguished by the

(a) 2 Atk. 246.

1758.

WRIGHT

v.

PEARSON.

1758.  
 ~~~~~  
 WRIGHT
 v.
 PEARSON.

superadded words, "their heirs and assigns for ever." Several cases were cited in *Bagshaw v. Spencer* of words of limitation superadded, which turned words of limitation into words of purchase; all founded on the principle in *Archer's* case, (for I do not rely on the circumstance of the word "heir" being in the singular number,) in all which cases there had been some words like "next," &c. which had been descriptive of an individual, and made them properly words of purchase (a).

In the case of *Bagshaw v. Spencer*, by the insertion of trustees to preserve contingent remainders, the court held the words "heirs of the body" words of purchase. They were also construed words of limitation in the same case. That case was, like this, the case of a trust: Lord *Hordwicke* did, upon that ground, and the limitation of the other moiety of the estate to the *Spencers*, and other circumstances in the case, which shewed the intent of the testator plain and clear, construe it to be only an estate for life in *Bagshaw*, contrary to the former determinations. He did it on the plain intent of the testator, and in so doing assumed no more power than every court of law possesses.

I proceed on the same principle myself. I think *Thomas Rayney* took an estate tail from the intent of the testator, who plainly intended the "heirs male, &c." should not take an estate in fee, which they must do if they take as purchasers. I was considering whether I could not make this construction: viz. to *Thomas* for life; then to his heirs male, in tail; then to the grandchildren: and if the limitation had been for default of such heirs of the body, I might have considered it as heirs of the body of the heirs male, &c. mentioned before, but the limitation there is for default of such issue male, &c.

(a) *Vide King v. Burchell, post. 424.*

It is true, the words "their heirs and assigns" will, on this construction, in a great measure be rendered ineffectual, and though it is a rule never to reject words in a will, if they can stand, yet I must do it in this case to support the testator's intent, because, if I give them their full effect, I destroy the substantial provisions in the will, of which the testator had a thorough understanding.

The ground of my determination is the manifest intent of the testator; and therefore, on the whole, I am of opinion that *Thomas Rayney* took an estate tail, and not an estate for life only, under this will, and that the recovery was well suffered by him, and the defendants consequently well entitled to the estate.

An appeal was entered from this decree to the *House of Lords*, 6th December, 1758, but it was afterwards, upon the petition of the appellants, withdrawn. 25th May, 1759, *Lords' Journals*.

Mr. *Fearne* has entered into a very elaborate discussion of this case. (C. R. p. 126, *et seq.*) He shews that Lord *Hardwicke*, in denying the distinction between trusts executed and trusts executory, as he did in *Bagshaw v. Spencer*, went in opposition to former precedents, and even to his own opinions and decisions in prior cases which he has there enumerated: to these may be added, *Exell v. Wallace*, 2 *Ves.* 223. cit. 1 *Mad. Chan.* 461. He blames the *Lord Keeper* for studiously affecting, in words at least, a concurrence with

that doctrine, while he, in fact, struck it to the root by a contrary decision, in a case which more obviously courted its admission. It however terminated in the case which produced it; as appears from the subsequent cases which Mr. *Fearne* has collected, and to which his learned editor has added the observations of the *Master of the Rolls* in *Brydges v. Brydges*, 3 *Ves.* 120. *Vide* also the case of *Green v. Stephens*, 17 *Ves.* 64. It is now clearly settled that the same construction must be put upon words of limitation in cases of trusts, as

1758.
WRIGHT
v.
PEARSON.

of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees: *vide* also *Stanley v. Lennard*, *ante*, 95. *Austen v. Taylor*, *post*. 36L. *King v. Burchell*, *post*. 424. *White v. Carter*, *post*. Vol. II. p. 366.

1758.
20th, 21st June,
S. C.
Sewell, MSS.

51st PS. 428.
62.13.8.642.
Ap. Ca. 237.

BLAAUWPOT v. DA COSTA.
(Reg. Lib. A. 1757. fol. 424.)

Satisfaction having been made, under a royal commission for distribution of prizes to the insured, such of the insurers as had paid, held entitled to restitution though foreigners; but not those who had compounded and renounced salvage.

THE plaintiffs, as underwriters, by a policy of insurance made at *Amsterdam*, 1st *February*, 1729, to *Elias* and *Solomon De Paz*, had insured the ship *Friendship* for 18,000 guelders, or £1636 7s. 3d. The ship was soon after seized by the *Spaniards*, before the declaration of war, and carried into *Havannah* and condemned. In the course of the following year the plaintiffs paid the sum of 18,000 guelders to *Elias* and *Solomon De Paz*. The ship had also been insured with the Royal Exchange Assurance Company for the sum of £1500; but the company had afterwards compounded, and renounced salvage. His Majesty, by a proclamation issued 18th *June*, 1741, was pleased to order a distribution of all prizes taken before the declaration of war, in equal moieties between the sufferers and the captors. Accordingly, under a commission for the distribution of such prizes, the sum of £2050 18s. 6d. was, on the 9th of *November*, 1746, paid to the executors of *Elias De Paz*, as a compensation for the loss of the ship *Friendship*. The bill was brought to recover the sum of £1636 7s. 3d.

The *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Pechell* for the plaintiffs.

The plaintiffs ought to be repaid from the defendants in proportion to what they received from the crown. The defendants have had a double satisfaction. It is

like the case of a supposed loss of a ship, money paid, and the ship afterwards discovered to be in safety.

1758.

BLAAUWPOT
v.
DA COSTA.

The *Attorney-General* for the Royal Exchange Assurance Office contended, that though the office compounded and renounced salvage, yet that such composition was only meant to extend to any part of the ship or goods that might be recovered, or to any satisfaction or restitution that might be made by the Spanish captors to the sufferers.

Sewell and *Perrot* for the executors of the *De Pazes*.

If this is in the nature of salvage, the underwriters must undoubtedly have the benefit of it. But it is not so; it is a grant of the king: a royal bounty to British sufferers, and not an act of justice. The commissioners for the distribution were only allowed to pay the difference to the sufferers. The plaintiffs as foreigners could not have claimed under the commission.

The Lord KEEPER.

I am of opinion that upon the policy, and the peril happening, and the payment of the money by the underwriters, the whole rights of the assured vested in them. The assured had this right of restitution vested in them against the Spanish captors, which was afterwards prosecuted by the crown by reprisals. Satisfaction having been made in consequence of that capture, I think the plaintiffs are entitled to that benefit; and that it was received by the executors of *Elias De Paz* in trust for them. The defence of the plaintiffs being foreigners, and as such not entitled to any benefit, is a fallacy: they stand in the place of British subjects, and have therefore in this court the same rights as British subjects. The capture is the origin of that right, which belongs to the plaintiffs by relation, as claiming under one of the sufferers.

1758.
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 BLAAUWPOT  
 v.  
 DA COSTA.

As to the nature of the salvage, it was so much saved out of the hands of the *Spaniards* by means of the interposition of the crown: it was so understood by the crown. It was to be considered as a retribution to the underwriters as lessening the loss incurred by the capture. As to the Royal Exchange Assurance, they have no foundation whatever for their claim; they have settled their loss with the assured, and renounced all benefit of salvage.

Decreed the sum of £1636 7s. 3d. with interest at 4 per cent. from the time of the payment of the £2050 18s. 6d. and costs (a).

(a) The case of *Randall* in point: it does not appear v. *Cochran*, 1 *Ves.* 98, arose to have been cited. *Vide Park* in consequence of the same on Insurance, 226, 227. proclamation, and is precisely

1758.  
 5th July.  
 S. C.  
*Sugd.* on Powers,  
 App.  
*Amb.* MSS.

1905. 10h. 125.

ALEYN v. BELCHIER.

(*Reg. Lib.* A. 1757. fol. 432.)

Power of jointuring executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts: held, a fraud upon the power, and the execution set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.

THE Reverend *Thomas Aleyn*, being seised of a real estate in *Essex* of the yearly value of £540, subject to a mortgage for a term of five hundred years to *Sir Charles Palmer* for £500, and having a nephew, *Edmund Aleyn*, and two brothers, the plaintiff, *Giles Aleyn*, and *William*, who was a defendant, by his will, bearing date the 28th of *May*, 1746, devised the same to *Eyre* and *Bragg*, in trust, by sale or mortgage, to raise money and pay his debts and legacies, and to permit his wife to receive the rents and profits of the residue for her life, and after her death, in trust, to convey to

his nephew *Edmund* for life, with remainder to his first and other sons in tail male, with proper limitation, to support contingent remainders, with a power to his nephew to make a jointure on any woman he should then after marry for her life, in bar of dower; with powers to provide for younger children, and to make leases, with remainder to the testator's brother *Giles* for life, remainder to his first and other sons in tail male; remainder to his brother *William* for life; remainder to his first and other sons in tail male; remainder to his own right heirs: he gave his brother the plaintiff an annuity of £30 a year for his life, to be paid out of his estate, to be increased to £50 a year in case his nephew should survive his, the testator's wife.

A bill was filed soon after the testator's death by the widow, and on the 14th of *February*, 1749, a decree made to establish the will, and for payment of debts and legacies by mortgage or sale in the usual way. The Master reported there was due for debts and legacies £1516 1s. 10d. which he approved to be raised by mortgage. The widow died in *April*, 1750, and *Edmund* became entitled to the possession of the estate. The defendant, *William Belchier*, having advanced money to pay off the incumbrances, a mortgage, bearing date the 26th and 27th of *June*, 1750, was made of the estate to him in fee, and the term for years was assigned to *John Belchier*, in trust for *W. Belchier*.

*Edmund* was very extravagant, and became indebted to *William Belchier*, in the sum of £1760.

On the 4th *June*, 1750, *Edmund* married the defendant *Jane*, who was a low woman without fortune, and no provision for her was either made or agreed to be made; but soon after the marriage, by articles of agreement, bearing date the 1st of *August*, 1750, and made between *Edmund Aleyn* and his wife of the one part, and *William Belchier*

1758.

ALEYN

v.

BELCHIER.

1758.

ALEYN

v.

BELCHIER.

of the other, reciting the will of *Thomas Aleyn*, giving *Edmund* a power of jointuring, and that he and *Jane* were lately married; and that he was indebted to *William Belchier*, in the sum of £1760, besides the mortgage; *Edmund Aleyn*, in satisfaction and discharge of the said sum of £1760, and in consideration of the several annuities and money thereafter agreed to be paid, covenanted within six months, to procure an effectual conveyance and settlement, to be made by the trustees in *Thomas Aleyn's* will; and immediately after such settlement should be made, to appoint the whole estate to his wife for her life, in case she should survive him, for her jointure; and that he and his wife, as soon as they should become respectively seised of the legal estate of freehold, would, by fine and conveyances, convey and assure all the said premises by the said will devised and intended to be settled, unto and to the use of *William Belchier*, his heirs and assigns, during the lives of *Edmund Aleyn* and *Jane* his wife, and the longer liver of them, and in consideration thereof, *William Belchier* covenanted, that in case the said settlement should be perfected, whereby the estate should become well vested in him and his heirs, for the lives of *Edmund* and *Jane* his wife, and the longer liver of them, to pay the several annuities after mentioned, namely, to *Jane Aleyn* during the joint lives of her and *Edmund* her husband £60 a year, clear of all deductions, for her separate use; to *Edmund Aleyn*, for his life, in case he should survive *Jane* his wife, £60 clear of all deductions, and to *Jane*, in case she should survive *Edmund* her husband, for her life £100 a year, clear of all deductions, and to pay to *John Miles*, son of *Jane* by a former husband, £105 at the age of twenty-one years; and also to pay *Jane* £5 yearly towards his maintenance and education, till the £105 should become payable.

The estate was conveyed by lease and release of 6th



and 7th of *August*, 1750, to the uses of *Thomas Aleyn's* will, pursuant to the decree; and by deed, dated 8th of *August*, 1750, reciting the conveyance and power to jointure, *Edmund Aleyn*, in consideration of the marriage, and in order to make a provision for *Jane* his wife, appointed the whole estate to *Jane* his wife for a jointure, subject to the payment of the annuities given by the will of *Thomas Aleyn*, and of the mortgage of £1516 1s. 10d. and interest.

1758.  
ALEYN  
v.  
BELCHIER.

On the 10th of *August*, 1750, *Edmund Aleyn* and *Jane* his wife executed a deed, by which *Edmund* covenanted with *George Townsend*, that he and his wife would levy a fine of the premises to *Townsend* and his heirs, for and during the lives of *Edmund* and his wife, and the longer liver of them, in trust for *William Belchier* and his heirs, which was levied accordingly.

*William Belchier* took possession of the estate, and received the rents and profits, and paid the plaintiff, during *Edmund's* life, two sums of £25 and £21 5s. in part of the annuity he was entitled to under *Thomas Aleyn's* will.

*Edmund* died in *June*, 1755.

On the 26th of *November*, 1756, the plaintiff filed the present bill to redeem the estate on payment of £1516 1s. 10d. the mortgage money borrowed under the decree, and to be let into the possession of the estate; for an account of the rents and profits from the death of *Edmund*, submitting to pay *Jane* £100 a year for her life; and to have the deeds and writings of the estate delivered up.

*Jane Aleyn* and *William Belchier* admitted in their several answers the facts as before stated. *Jane Aleyn* said, that the settlement was intended to make a reasonable provision for her, and to save *Edmund* from ruin; and that if *Edmund* had not been in debt at

1758.

ALEYN

v.

BELCHIER.

the time of their marriage, he would have settled the whole estate on her for her jointure. *William Belchier* said, that the consideration of the settlement and conveyance was truly and *bonâ fide* advanced, part before the execution of the settlement, and the remainder at or about the time of the execution of the settlement and conveyance to *Townsend*; and they both admitted that *Edmund* was at the time of the settlement in distressed circumstances, and in want of money.

Mr. *Perrot* and Mr. *Ambler* for the plaintiff.

This is an improper execution of the power which was to bar dower by giving a jointure; but even supposing it well executed, the fraud will vitiate it. The appointment and conveyance were a deceit upon the testator, and a fraud upon the remainder-men. The power given to the nephew, who was only tenant for life, was to make a fair jointure to encourage him to marry, not to pay his debts. The remainder-man was only to be kept out of the estate, in case a fair and honest jointure were made. It must not be colourable, and for other purposes. This was an artful contrivance of *Belchier* and the defendant *Jane*, a low, mean woman, of no fortune. There is no settlement, nor agreement for one at the time of the marriage, nor till *Belchier* put it into *Edmund's* head with a view to secure his own debt by taking an absolute interest in the estate for two lives, instead of a mortgage for *Edmund's* life only. It is at best an unreasonable bargain. The articles of the 1st *August* discover the whole scheme. Upon the face of them it appears, it was not the intention to jointure, but to pay debts. The only jointure averred is £100 a year. *Edmund* is stripped of every thing during the joint lives of himself and his wife, only £60 a year to be paid during their joint lives, and that to the separate use of the wife. Suppose a power to make a jointure of so much for every thousand pounds

fortune. It has been repeatedly held, that if the husband or others advance a sum of money colourably, to authorize the husband to settle largely, a court of equity will set aside all above the proportion of the real value of the fortune (a). So, if a father, having a power to appoint amongst his children, bargains with one for a share, equity will set it aside. Though it may be honest in *Edmund* to pay his debts, it must be done with his own money. This is a method of doing it with other persons' money, contrary to the intention of the testator. Even admitting the estate had been fairly and *bonâ fide* appointed as a jointure, and the wife had afterwards parted with her jointure, or part of it, to pay her husband's debts, it would have been good to bind the remainder-man: yet, in this case the whole is one transaction, a collusion between the husband and wife and *Belchier*. The case of *Lane v. Page*, determined by Lord *Hardwicke*, is precisely in point.

1758.  
ALEYN  
v.  
BELCHIER.

The *Attorney-General* and *Solicitor-General* for the defendant, *Belchier*; Mr. *Clark* for the jointress.

The first question is, as to the extent of the power given by the will. The objection that the power is only to bar dower, and consequently can only comprehend jointures made before marriage, is too extensive, as it will comprehend every jointure, though made *bonâ fide*. The devise is to a nephew having no estate of his own for life, without impeachment of waste: he had no estate to which dower could attach; which shews that the words were put in by the scrivener *currente calamo*.

As to the execution, the power was substantially executed. The husband and wife agreed to sell their interest to *Belchier*. If an appointment had been made of the

(a) *Lane v. Page*, *Amb.* 233. Lord *Tyrconnel v. Duke of Ancaster*, *ib.* 237.

1758.

ALEYN

v.

BELCHIER.

whole estate, and the wife had afterwards joined with the husband, and sold her interest, it would have been good, if only a day had intervened. This is the same thing. Suppose the wife had made a stand after the power was executed, the court would not have compelled her to levy a fine. It was in her power to do it or not. In the case put of a father appointing to a child, making himself a partaker, the appointment would only be avoided as against other children, not against a remainder-man.

*The Lord KEEPER.*

The question is, whether *Edmund Aleyne* has properly executed the power as a jointure, and has properly conveyed to the defendant *Belchier*, or whether the transaction is void *in toto* or in part. I am inclined to think the power was not well executed in point of law. It ought to have been before marriage. The power is given under restrictions. It must be a jointure in bar of dower, which can only be before marriage. Dower is not barrable by a jointure after marriage. But I build my opinion upon the next question. The whole transaction is on agreement between the husband and wife. No point is better established than that, a person having a power, must execute it *bonâ fide* for the end designed, otherwise it is corrupt and void. The power here was intended for a jointure, not to pay the husband's debts. The motive that induced *Edmund* to execute it was not a provision for his wife. This case is not distinguishable from the cases alluded to, nor from *Lane v. Page*. If a father has a power to appoint amongst children, and agrees with one of them for a sum of money to appoint to him, such appointment would be void. It was admitted the execution would be void; but it was said to be only so amongst the children. In that case the money is to go to the children; no other person has any interest in it. Here the remain-

der-man has an immediate right to the estate after the death of *Edmund*, if there is no appointment. It was said to differ from the case of parent and children; and, that if the husband had fairly executed the power, the wife might have immediately afterwards joined in a fine to pay his debts. The reason is plain: she would then have had a first interest, and the husband would have had no control over it; but it does not from thence follow that they might make an agreement to divide the money between them. It cannot be supposed he would have settled the whole on her without some such view. She was of no family, and had no fortune. It would have kept the children, if they had any, entirely out of the estate till her death. It is like the case put of parents and children; and I think *Lane v. Page* is in point, and ought to govern my decision in the present case.

Declare the appointment good, as to the £100 only, for the benefit of *Jane*. The plaintiff to redeem, on payment of principal and interest of the mortgage and costs, so far as relates to the mortgage. Account of rents and profits from the death of *Edmund*; and *Belchier* to pay the rest of the costs.

1758.  
ALEYN  
v.  
BELCHIER.

As to relief in equity against fraudulent executions of powers, *vid. Sugd. on Powers*, 400. *et seq. Macqueen v. Farquhar*, 11 *Ves.* 467. *Palmer v. Wheeler*, 2 *Ba. & Be.* 18. *Daubeny v. Cockburn*, 1 *Merriv.* 626. *Davis v. Uphill*, 1 *Sm.* 136.

In the latter case one point directed by the court, to be particularly spoken to, was,

whether a fraudulent appointment is void *in toto* or in part only; and *Lane v. Page*, and *Aleyn v. Belchier*, were relied upon to shew that it would be only void in part. Sir *W. Grant*, however, held that no part of a fraudulent agreement could be supported, except where a consideration had been given, in consequence of which the parties could not be

1758.  
 ~~~~~  
 ALEYN
 v.
 BELCHIER.

restored to their original situation. That in *Lane v. Page* the subsequent marriage formed such a consideration on the part of the wife; and that, in *Aleyn v. Belchier*, though the appointment was subsequent to the marriage, yet the bill contained a submission to pay the annuity, and only sought relief against the other objects of the appointment.

11th & 12th
 July, 1758.

39 Ch. D. 116.

BROWN v. PECK.

(*Reg. Lib. B. 1757, fol. 589.*)

Devise and legacy from an uncle to his niece, held not adeemed by an advancement upon her marriage.

Bequest of an allowance to a feme-covert on condition she lived apart from her husband, held the condition *contra bonos mores* and void.

WILLIAM SPARKS, by his will, bearing date the 6th of *January*, 1756, devised *inter alia* to his niece, *Elizabeth Sparks*, eight dwelling-houses, with divers remainders over, and also gave her two several legacies of £500 each. The testator gave to *Charles Umphreville*, who had married his niece *Rebecca Sparks*, five shillings and no more; because he had married his said niece without the consent of her mother, or one of her relations; and after leaving his said niece *Rebecca Umphreville* £15 for mourning, he directed, that if she lived with her husband, his executors should pay her £2 per month, and no more; but if she lived from him, and with her mother *Sparks*, then they should allow her £5 per month.

By indenture, bearing date the 24th of *September*, 1756, made upon the marriage of *Elizabeth Sparks* with the defendant *Peck*, the testator settled five dwelling-houses (one of which was the same with one which he had devised to *Elizabeth Sparks* by his will), and the sum of £500, upon the husband and wife successively, and the issue of the marriage.

Upon a bill brought to have the will established and

Explained, one question was, whether the advancement by the settlement was an ademption? There was another question upon the amount of the allowance to be made to Mrs. *Umphreville*.

1758.
BROWN
v.
PECK.

The testator had four nieces, and evidence was entered into by the plaintiffs, to shew that he intended the portion to be an ademption of what was left by the will; but it amounted to nothing more than general declarations, that they should all be equally provided for.

The *Solicitor-General* and Mr. *Wilbraham*, for the plaintiffs, cited and relied upon *Hartop v. Whitmore*, 1 P. W. 681, and contended, that the testator stood in *loco parentis*, and that the case was therefore different from *Shudal v. Jekyl* (a); that it was evident that the testator intended it to be adeemed from the circumstance of the settlement comprising one of the same houses devised by the will, and also from the declarations of the testator.

Mr. *Perrot* and Mr. *Comyn* for the *Umphrevilles*.
The *Attorney-General* and Mr. *de Grey* for the *Pecks*.

The *Lord Keeper* was of opinion, that the settlement made by the testator on his niece, *Elixabeth Sparks*, was not an ademption or satisfaction of the devises and bequests made to her in the said will; but that she was entitled both to what she took under the settlement, and what was given to her under the will (b).

(a) 2 Atk. 510.

lifetime, may be intended for the same purposes; but it must appear that he meant to put himself in *loco parentis*. For there are no cases where it has been so held, if the second gift appeared to be *diverso intuitu*. *Spinks v. Robins*, 2 Atk. 491. *Shudal v. Jekyll*, *ib.* 510. *Grave v.*

(b) The doctrine of ademption of legacies, is confined to the cases of parents and persons placing themselves in *loco parentis*. There are cases, as Lord *Thurlow* observes, (2 Bro. C. C. 518,) where a man may describe himself so, that the gift by will, and that in his

1758.
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 BROWN  
 v.  
 PECK.  
 [ \* 142 ]

And upon the question whether Mrs. *Umphreville* was entitled to the monthly payment of £5, his lordship declared that he was of opinion that she was; and that the \*condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure (a). A third question upon the consideration of the residuary clause, was decided in favour of the children of the testator's nephews and nieces living at his death.

Lord Salisbury, 1 Bro. C. C. Rumboll, post. Vol. II. 18. & 425. *Debeze v. Mann*, 2 *Byde v. Byde*, ib. 25. Bro. C. C. 165. *Powell v. (a) Of conditions contrary Cleaver*, ib. 499. *Ellison v. to law and good manners, Cookson*, 3 Bro. C. C. 61. 1 *vide Swinb. on Testaments, Ves. jun.* 100. *Trimmer v. part 4. sect. 5. Totk.* 78. *Bayne*, 7 *Ves.* 508. *Monck 8 Vin. Ab.* 340. 1 *Vern. v. Lord Monck*, 1 *Ba. & Be.* 413. *Eden on Injunctions*, 298. *Ex parte Pye*, 18 *Ves.* 18. 140. *Vide also Rumboll v.*

1758.  
 17th and 18th  
 July.  
 S. C.

*Amb.* 363.

Devise of testator's estate at A. to his eldest son and his heirs, and in default of such, to the heirs of his other children; his estate at B. to the husbands of his two daughters in like manner: held, the former an estate tail, the latter a joint estate in fee.

## PICKERING v. TOWERS.

(*Reg. Lib.* B. 1757, fol. 510.)

SAMUEL TOWERS being seised in fee of an estate at *Paddington*, and also of another estate at the *Seven Dials*, devised as follows: “*Imprimis*, I give to my son *James Towers* all my estate in the parish of *Paddington*, and to his heirs, and in default of such, to be equally divided between the heirs of my other children: *item*, I give to the two husbands of my two daughters, *viz.* *William Pickering* and *John Pickering*, all my estate at the *Seven Dials*, and to their heirs, and in default of such, to be equally divided amongst my other children.”



*John Pickering* died in the lifetime of the testator, leaving issue the plaintiffs: the testator died the 27th of *May*, 1757, leaving the defendant, *George Towers*, his eldest son, and one of his executors.

1758.  
PICKERING  
v.  
TOWERS.

The present bill was filed to carry the trusts of the will into execution, and to declare the rights of parties. Two questions arose upon it: first, whether *James Towers* took an estate in fee or in tail in the *Paddington* estate; and secondly, whether the estate at the *Seven Dials* was devised to the husbands of the testator's daughters as tenants in common, or joint tenants.

*The Lord KEEPER.*

As to the two questions upon the devise of the *Paddington* and the *Seven Dials* estates, they must depend upon the testator's intent, to be collected from the words of the will, and the rules of law applied to them. No court has a right to depart from the *lex scripta testatoris*, and supply from its own judgment what the testator should have ordained. That would make real property precarious and arbitrary, and to vary with the judgment of the court.

The words, as to the *Paddington* estate, are, "to *James* and his heirs, and in default of such, to the heirs of my other children." It is admitted that, in such a case the remainder over restrains the general word "heirs" to a special meaning, "heirs of the body." Why? Because there could not be a failure of general heirs, while there was a person capable of taking the remainder.

In all cases of this kind the word "heirs" is *nomen universale*, and the restriction arises from the limitation over. But *cessante causâ, cessat effectus*: and therefore, if the limitation over be to a person not capable of being a general heir, the word "heir" is construed as general heir, *Webb v. Herring*, *Cro. Jac.* 415.

1758.  
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 PICKERING
 v.
 TOWERS.


This construction, indeed, is liable to the objection of Mr. *Wilbraham*, that the words of limitation over are rejected. But they are not rejected against the rule alluded to, which is, that every word in a will shall, if possible, have a meaning. They have indeed a meaning, but they are rejected because the testator attempts to do what the law will not permit him. Wherever there is a limitation, it may be fairly argued from conjecture, that the testator intended only to limit a particular estate; for every one is supposed conusant of law: if so, he knows that he cannot limit a fee on a fee, and must consequently mean to limit it on a particular estate. But the reason why the law does not construe it so, is, because the law does not conjecture, and the intent from the words is otherwise.

But it is said that it is absurd to suppose the testator should give the estate to the husbands of his daughters in fee; and therefore I am desired to construe it a joint estate for life, with a limitation to the heirs of their several bodies as tenants in common. *Cook v. Cook*, 2 Vern. 545. *Wilkinson v. Spearman*, cited *ib.* And for what purpose? To let one devisee take it without any security to the issue, only that it may lapse, and go contrary to the primary meaning of the testator's will.

I must stand on decisions, and not go on these conjectures that have no firm or fixed basis; and therefore I am of opinion that *James Towers* took an estate tail, and that the two husbands took a joint estate in fee.

With the single exception of the judgment of the court in *Hearn v. Allen*, Cro. Car. 57, against the opinions of "two very great judges, Yel-
verton and *Croke*," this distinction has been adhered to in all the other cases, as well precedent as subsequent. *Soule v. Gerrard*, Cro. Eliz. 525,

Webb v. Herring, Cro. Jac. 415. *Chadock v. Cowley*, ib. 695. *Tilley v. Collier*, 2 Lev. 162. *Parker v. Thacker*, 3 Lev. 70. *Allen v. Spendlove*, 1 Freem. 74. 2 Eq. Ab. 305. *Law v. Davis*, Stra. 849. *Nottingham v. Jennings*, 1 P. W. 23. *Attorney-General v. Gill*, 3 P. W. 369. *Tyte v. Willis*, For. 1. *Tilburgh v. Barbut*, 1 Ves. 89. 3 Atk. 617. *Pres-*
ton v. Funnell, Willes, 164. *Crumble v. Jones*, cit. ib. *Ginger v. White*, ib. 348. *Goodright v. Goodridge*, ib. 369. *Morgan v. Griffiths*, Comp. 234. *Denn v. Shenton*, ib. 410. *Doe v. Fyldes*, ib. 833. *Porter v. Bradley*, 3 T. R. 145. *Doe v. Perryn*, ib. 491. *Ives v. Legge*, cit. ib. *Fearne*, Ex. Dev. 466. *Doe v. Bluck*, 6 Taunt. 485.

1758.

PICKERING
v.
TOWERS.

HARDEN v. PARSONS.

(Reg. Lib. A. 1757. fol. 440.)

1758.
 20th and 21st
 July.
 S. C.
 Sewell, MSS.

JOHN STOKES by his will, bearing date the 6th of *August*, 1725, gave the sum of £1000 to be invested in land, and settled to the use of *John Stokes* and his heirs lawfully begotten, with remainder to *Samuel Stokes* in the same manner. He appointed *Lyon Lyde*, *Andrew Parsons*, *John Thomas*, *Benjamin Milles*, and *William Thornhill*, his executors. By a codicil, bearing date the 25th of *August*, 1726, he afterwards reduced the sum to £400, and died in 1727. All the executors acted except *Milles*.

Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust, and the legatee and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed.

The sum of £1000 which was due to the testator upon mortgage at his death, having been called in and paid on the 1st of *October*, 1731, was lent to *Lyde*, who was a considerable merchant at *Bristol*, who gave a bond to the other executors, which was deposited with their clerk.

1758.

HARDEN
v.
PARSONS.

By indenture, bearing date the 29th of *March*, 1738, reciting the devise under the will and the words of the limitations, the names of the executors, and the codicil verbatim; and that the sum of £400 had not been laid out in lands according to the directions of the said testator, but that the same remained in the hands of the trustees, some or one of them; the said *John Stokes* assigned his interest in the same to the plaintiff *Harden*.

Lyde regularly paid the interest upon the bond till 1735, when he paid off the sum of £565, which reduced the principal to £400; and from that time to his death, in 1744, he regularly paid the interest of the £400 to *Stokes*: *Lyde* dying insolvent, the present bill was brought to charge the executors with the legacy.

The *Attorney-General*, the *Solicitor-General*, and Mr. *de Grey*, for the plaintiffs.

This claim has two foundations in the general rules of this court. First, that every executor joining in a receipt, is chargeable in the whole. The difference between a trustee and an executor in this respect is well known. A trustee joining shall not be charged but on actual receipt of the money; but an executor is, because he need not join. *Fellows v. Mitchell*, 1 P. Wms. 81. *Murrell v. Cox*, 2 Vern. 570. The second rule is, that an executor lending out the testator's money on an insolvent security is liable to answer for it; and it is not necessary that the person he lends it to should be notoriously insolvent; it is sufficient to constitute a breach of trust, if the money be lent without proper inquiry and special security. Here was a special trust to lay out this money in land. In whatever credit *Lyde* might have been at the time the money was lent, the mere circumstance of lending it on bond, and his afterwards becoming insolvent, is a breach of trust. It was a proceeding which no prudent man could have advised. Trustees have been held more

strictly accountable by the modern cases, than former ones.

Tilsey v. Throckmorton, 2 Ch. Ca. 132.

Mr. Sewell, Mr. Wilbraham, and Mr. Browning, for the defendants.

1758.

HARDEN.
v.
PARSONS.


Executors are certainly under great hardships from the severity with which the courts' have in one or two instances carried this presumption against them. *Gill v. the Attorney-General*, Hard. 314. *Townley v. Chaloner*, Cro. Car. 312. *Bridg.* 35. But it is so contrary to natural justice to charge a man for what another receives, that circumstances will take a case out of that rule. As to the security, a trustee can only be answerable for gross negligence. It has never been decided that a trustee may not lend out the money on bond: and in the present case the plaintiffs might have insisted upon its being called in, and laid out in land, which they never did.

The Lord KEEPER.

This is a bill brought to have a legacy invested in land, pursuant to the will of *John Stokes*, which legacy became due in the year 1727, being thirty-one years ago; and it is to have it paid by the executors, the money having been lost by an insolvent security; and the claim of the plaintiff is said to be founded upon two legal principles. 1st, That two executors joining in a receipt are each chargeable *pro toto*. 2dly, That an executor lending out money on a personal security, is guilty of a breach of trust, and liable to the payment of the money.

As to the first point: it seems, by the cases, that at law a joint receipt is conclusive evidence, that the money came to the hands of both, and is not to be contradicted. But this court, which rejects estoppels, and pursues truth, will decree according to the justice and verity of the fact. *Churchill v. Hobson*, 1 P. W. 241. And what is said in that case by Lord *Harcourt*, as to the distinction be-

1758.


HARDEN
v.
PARSONS.

tween a receipt of this kind as to a legatee and a creditor, seems to have this meaning, that a creditor may at law charge both executors on a joint receipt; but that in this court, where alone legacies are received, such receipt shall not be conclusive, but the court will see who actually received, and charge that person accordingly (*a*). Therefore, had this been the case of a joint receipt given by all the executors, and it had appeared that one only had received, I should have thought that I could not have been justified in charging the other (*b*).

But we are arguing a point of law without a case to apply it to. For here is no evidence that *Parsons* gave a joint receipt; the answer is the only evidence of the transaction.

The next consideration must proceed upon a supposition that the money was received and lent out on an improper security, and that they are guilty of a breach of trust. It is said that they cannot place it out on personal security. It is agreed that there is no text writer that lays down that rule, nor any case which establishes it. If so, we must resort to the inquiry into the nature of the office and duty of a trustee as considered in a court of equity. No man can require, or with reason expect a trustee to manage his property with the same care and discretion that he would his own. Therefore the true touchstone by which such cases are to be tried is, whether the trustee has been guilty of a breach of trust or not. If he has been guilty of a gross negligence, it is as bad in its consequences as fraud, and is a breach of trust. The lending trust money on a note, is not a breach of trust,

(*a*) *Vid.* Lord *Thurlow's* *Redesdale's* observations in observation on Lord *Har-* *Doyle v. Blake*, 2 *Sch. & Lef.* *court's* distinction, 2 *Bro.* 117. 239.

2 *Fonb. Tr. on Eq.* 182. *Gibbs* (*b*) *Vid.* *Westley v. Clarke*,
v. Herring, cit. *ib.* and Lord *post.* 357, and note.

without other circumstances *crassæ negligentiae*. That is plain from the case of *Ryder v. Bickerston* (a), where a sum of money was left to be placed out on security, with the best interest that could be got. The executor had lent it on a note without interest. Did the court say that

1758.


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HARDEN
v.
PARSONS.

(a) There is a short note of this case in 7 *Bac. Ab.* 182; but none of the particular circumstances are stated.

By a MS. report in the Editor's possession, the case appears to have been as follows: By indenture before the marriage of the plaintiff with her late husband, *Thomas Ryder*, it was covenanted that the sum of £800, then upon mortgage, should, within three months after the marriage, be assured or transferred to the defendant, his executors, &c. to be by him and them, from time to time, called in and placed out at interest, upon the best security that could be got for the same, in the name of the defendant, with the consent and approbation of the said *Thomas Ryder* and *Elizabeth* his wife, &c. The trustee, with the consent of the husband only, lent this sum to the uncle of the husband upon a promissory note, which carried no interest but

from the time of demand. Lord *Hardwicke*, C., held, that he ought to make satisfaction for the £800 and interest. His Lordship said that it was plain that the defendant had been guilty of a breach of trust; that gross negligence is a breach of trust, and a trustee is liable for that in a court of equity, as well as for fraud; that there had been (with regard to the utmost that could be said for him) the grossest negligence. This trust was to place it out at interest upon the best security, with the consent of the husband and wife, or the survivor. He had placed it out neither at interest nor on security. That it was a direct breach of his trust in two respects, interest and security, and a direct contradiction of the words of the trust. This case has been since more fully reported (3 *Swa.* 80.) from Lord *Colchester's* MSS.

28 Ch. D. 1004.

1758.

 HARDEN
 v.
 PARSONS.

it was a clear breach of trust to lend it on a personal security? No. The court heard counsel, and gave a solemn opinion to shew the gross negligence in that particular case; and there was not an intimation that a fair loan of rational credit is, in itself, a breach of trust. But it is said, and Mr. *Attorney* applies to Mr. *Wilbraham*, knowing his habitual timidity about money matters, and asks him, whether *he* would do it? Perhaps not: but other prudent men do (a).

The confirmation here is most deliberate, uniform, and steady, both in *John Stokes* deceased, and in *Samuel* the present plaintiff. *John Stokes* knew of the will and the trusts of it, and recites them in his assignment; all the family had legacies, particularly the remainder-man: they consent that the legacy shall continue, by not bringing their bill, or finding a purchase, and applying to the executors to lay out the money in land.

Bill dismissed.

(a) It is now, however, clearly settled, that executors or trustees cannot lend money upon personal security. *Adye v. Feuilleteau*, 1 Cox, 24. S. C. 3 Swa. 80. *Wilkes v. Steward*, Coop. Rep. 6. *Walker v. Symonds*, 3 Swa. 1. As to the cases upon the general doctrine of the liability of trustees and executors, vide *Sadler v. Hobbs*, 2 Bro. C. C. 114. *Scurfield v. Howes*, 3 Bro. C. C. 90. *Rowth v. Howell*, 3 Ves. 565. *Knight v. Lord Plymouth*, cit. *ib.* *Hovey v. Blakeman*, 4 Ves. 596. *Bacon v. Bacon*, 5 Ves. 331. *Adams v. Claxton*, 6 Ves. 226. *Caffrey v. Darby*, *ib.* 488. *Chambers v. Minchin*, 7 Ves. 186. *Doyle v. Blake*, 2 Sch. & Lef. 231. *Brice v. Stokes*, 11 Ves. 319. *Langford v. Gascoyne*, *ib.* 333. *Wren v. Kirton*, *ib.* 377. *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 477. *Tebbs v. Carpenter*, 1 Mad. Rep. 290. *Underwood v. Stevens*, 1 Meriv. 712.

WHITAKER v. AMBLER.

(Reg. Lib. B. 1757, fol. 525.)

1758.
24th July.S. C.
Sewell, MSS.

RICHARD WHITAKER being seised in fee of freehold estates in the counties of *Lancaster* and *Chester*, and also possessed of certain leasehold premises in *Manchester*, by his will bearing date the 9th of *January*, 1748, after giving some small legacies, gave and bequeathed all the rest, residue, and remainder of his personal estate, of what nature or kind soever the same might be, or wheresoever found, unto his loving wife *Mary Whitaker*, to her sole and separate use for ever. He also gave and bequeathed all his real estates wheresoever situate, lying, and being, unto his said loving wife, *Mary Whitaker*, for and during the term of her natural life, and from and after her decease he gave and bequeathed the same to trustees, their executors, and administrators, in trust, that from and out of the rents and profits therefrom arising immediately after the decease of his said wife, all the debts owing by his late son, *Joseph Whitaker*, deceased, at the time of his death, might be discharged; and so charged from and after the decease of his said wife, he gave, devised, and bequeathed his said real estate to the said trustees, their executors and administrators, in further trust, for such child or children, and the survivor of them, as had been already born of the body of *Elizabeth*, daughter of *John Gosling*, and whereof his late son *Joseph Whitaker* stood charged to be the father, if any such should be found, for and during the term of their natural lives, &c.; and after the decease of such child or children (as aforesaid), or in case no such child or children, as aforesaid, could be found

Devise of all testator's real estates wheresoever situate, lying, and being: held, not to include leaseholds as well as freeholds.

1758.

WHITAKER
v.
AMBLER.

living at the time of his wife's decease, he gave, devised, and bequeathed all his said real estate, charged as aforesaid, unto his nephews, the plaintiffs, *Robert* and *Benjamin Whitaker*, and their heirs for ever, equally to be divided between them, share and share alike.

The widow afterwards married the defendant *Ambler*, and there being no natural children of *Joseph Whitaker*, the present bill was brought, after her death, by the plaintiffs, for an account both of the real and personal estate of the testator, and the cause coming on at the *Rolls* on the 15th of *February*, 1758, his Honour was of opinion that the plaintiffs were entitled, not only to the freehold estates of the testator, but also to the premises comprised in the several terms of years, and an account was accordingly decreed from the death of the wife.

From this decree the defendant *Ambler* appealed.

Mr. *Perrot*, Mr. *Wilbraham*, and Mr. *Comyn*, in support of the petition of appeal.

The *Solicitor-General*, Mr. *Sewell*, and Mr. *Dawson*, *contra*, relied on the late case of *Lowther v. Cavendish*, *ante*, 99, and the intent of the testator to give over to his nephews every thing which he had given to his wife.


The Lord KEEPER.

The testator's intention seems clearly to be, to consider his estate under the distinction of real and personal. Real estate is, properly, an estate transmissible to his heirs. To say that what he intended to give his wife, he intended to give over, is a *petitio principii*. If a man, having a fee simple estate, and an estate for his wife's life, gives all his real estate to his wife, and after her death gives it over, he means, of course, such as was existing, and capable of going over. The nature and form of the devises over shew the testator's meaning. If Sir *James Lowther* had devised all his personal estate what-

soever to *James Lowther*, and had afterwards given all his lands, &c. to Sir *William*, I should have thought, even though he had used the words “mines, collieries, &c.” that nothing would have passed except the freeholds. I think there is no ground in the present case to narrow the general words of bequest of the personal estate to his wife, whom he calls his “loving wife,” for the sake of those, who were reputed bastard children of his son.

I am therefore of opinion, that, upon the will of the testator *Richard Whitaker*, he did not intend his leasehold estate should pass together with his freehold, but that they passed by the bequest of the personal estate to his wife, and that therefore so much of the decree must be reversed (a).

(a) *Vide Lowther v. Cavendish, ante 99, and note.*

1758.

 WHITAKER
 v.
 AMBLER.

GRAY v. SHAWNE.

(Reg. Lib. Min. 1757, 1758.)

18th & 19th July,
 & 20th Nov.
 1758.
 S. C.
 Amb. MSS.

JOHN GRAY, by his will, dated the 20th of *October*, 1730, bequeathed to his grandson, *William Shawne*, £100, to be put into the hands of his son, *John Gray*, the plaintiff, to be improved till his said grandson should attain the age of twenty-one; and in case his said grandson should die before twenty-one or afterwards without issue, then the money to be equally divided between the testator's two sons and daughter.

The testator died, leaving two sons, *John Gray* the plaintiff, and *William Gray* the defendant, and one daughter, *Elisabeth*, who married the defendant, *Caleb Whitehouse*. On the 24th of *March*, 1748, *William*

Bequest of £100 to *A.*, to be improved till he should attain the age of twenty-one; and in case he should die before twenty-one or afterwards without issue, then the money to be equally divided between the testator's sons and daughter: held the limitation over too remote.

1758.
 ~~~~~  
 GRAY  
 v.  
 SHAWNE.

*Shawne*, the legatee, attained the age of twenty-one, at which time the legacy had increased to the sum of £300. The plaintiff still continued, however, to hold the money for him; and, on the 3d of *April*, 1753 (at which time it amounted to the sum of £308 13s. 8d.), executed a memorandum as an acknowledgment for the above sum. *William Shawne* died 1756, leaving the defendant, *Elizabeth Shawne*, his widow and residuary legatee; and having constituted her and the defendant *Robert Thomas* executors of his will.


The bill prayed that the memorandum might be delivered up to be cancelled; and if not, that the executors might refund what they had received.

The *Attorney-General* and Mr. *Bonner* for the plaintiffs: Mr. *Perrot* for defendants, in the same interest.

The cases upon this point have been very numerous; and the opinions as to the validity of such limitations over, of personal property, extremely fluctuating. Some chancellors have construed them so as to make them, as much as possible, a general dying without issue; whilst others, like Lord *Macclesfield*, have held, that, from the nature of the thing limited, the limitation must be considered as referring to a special dying without issue. In the case of Lord *George Beauclerk* v. *Dormer* (a), the words were, "Miss *Dormer* I make my sole heir and executrix; if she die without issue, then to go to Lord *George Beauclerk*." In that case Lord *Hardwicke* considered the word "then" not as an adverb of time, but as a word of reference; and therefore, as it had no relation to the time at which the legatee might die, it would not have the effect of confining the limitation to a special dying without issue. But the present case is not liable to the same objection. It is very evident, that here the principal object in the testator's contemplation was

(a) 2 *Atk.* 309.

the time at which his grandson was to die without issue. The event upon which the legacy is to go over is a death, without issue living at the time of such particular death; and is therefore a sufficient designation of time, to render the limitation over valid. *Nicholls v. Skinner*, Pr. Can. 528. 1 P. W. 199. *Vachell v. Vachell*, 1 Ch. Ca. 129. *Pinbury v. Elkin*, 1 P. W. 563. *Gower v. Grosvenor*, Barn. Ch. Rep. 54.

1758.  
  
 GRAY  
 v.  
 SHAWNE.

The *Solicitor-General* and Mr. *Sewell* for the defendants, the executors.

Lord *Macclesfield*, in *Pinbury v. Elkin*, says the failure of issue may have three different senses: first, the legal one, and then it means a general failure of issue; secondly, if the party die without ever having had issue; thirdly, the vulgar sense, without having issue alive at the time of his death. Now, here the second limitation is disjunctive, "or afterwards"; and means, according to the above legal limitation of the words, a general failure of issue. Were the court to adopt a different mode of construction, it would be shaking a long train of former decisions. Such a method of construction would produce the greatest inconvenience, as it would have the tendency of tying up legacies in a manner contrary to the spirit of


*The Lord KEEPER.*

The single question between the parties is, whether the testator intended this limitation over to take place on the event of the grandson's dying generally without heir at any time, or on his dying without issue living at the time of his death. It is now settled beyond a dispute, that if the testator intended the limitation to take place after a general failure of issue, he intended a limitation the law will not allow of with respect to a chattel, and the limitation over is void. 20th Nov.

1758.  
—  
GRAY  
v.  
SHAWNE.

It seems to have been settled by the authority of many cases, that the words, "if he die without issue," primarily import a general failure of issue. The plaintiff's counsel therefore have contended that the failure of issue at the time of the death of the legatee was the event in the testator's contemplation. If I took their argument, the words "without issue" must be referred to the first part of the disjunctive as well as the last, as if the clause was worded thus: and in case he should die before twenty-one without issue, or afterwards without issue, then, &c. And that, unless the words "before twenty-one" were restrained to a dying without issue at the time of the death, they would be a sort of tautology; and being amplified by the words "or afterwards," would have been the same as if the testator had said, "or afterwards." But I do not see how I am, in the first place, warranted to refer the words "without issue" to both parts of the disjunctive, especially when such a reference will make the sentence imperfect, without supplying a sense which nothing in the will seems to warrant. The events of the limitation over appear to be expressed by the testator as distinct and independent. "If he die before twenty-one, then to go over, whether issue or not." No unreasonable check of marriage, or qualification of the bounty. "If he die afterwards without issue, then to go over." But if the testator had penned the will in that manner, and if he die before twenty-one without issue, I should not have been warranted in saying that the failure of issue in that case was restrained to the death. In the case of *Whitmore v. Weld* the contrary seems to have been determined, 1 Vern. 326. 347. Mr. *Whitmore* devised the surplus of his personal estate to Lord *Craven* during the minority of *W. Whitmore*, his only son, for the use of him and his heirs lawfully descended from his body, and to the use of the issue male of his sisters, in case his son died without

issue in his minority. The *Lord Chancellor* was of opinion the remainder over was void. And the reason seems to be, that though the death was tied up to the minority, the failure of issue was general.

1758.  
  
 GRAY  
 v.  
 SHAWNE.

It is unnecessary to run through all the cases on this point; they were enumerated and observed upon by Lord *Hardwicke* in the case of Lord *George Beauclerk v. Dormer*, and it was shewn that the word *then* would not restrain the generality of the words, but there must be particular expressions used by the testator for that purpose; as, “and leave no issue”, in *Forth v. Chapman* (a), “after his decease”, in *Pinbury v. Elkin*, “payable at a certain time after his decease”, in *Nicholls v. Hooper* (b), or the like; and none of these appear to me in the present case.

Mr. *Attorney-General* cited *Nicholls v. Skinner*, Prec. Can. 528. A devise of portions to children, payable at their respective ages of twenty-one, or marriage, which should first happen; and in case any of them should die before their portions became payable, or without issue, then his share should go over to the survivors. One died without issue, under age, and unmarried. First question was, whether on the will, in case of death without issue, being of a personal estate, the remainder over was good. His Honour was of opinion, and declared that in this case, the limitation being to the survivors, it could not be intended a dying without issue generally, which would make it void. Now in that case one of the events having happened of a dying before the payment accrued, and it not being contended that it was a conjunctive contingency, and that “or without issue”, meant “and without issue”, I do not see how that question could arise. But as to the reason given, because the limitation

(a) 1 P. W. 663.

(b) *Ib.* 193.

1758.  
 ~~~~~  
 GRAY
 v.
 SHAWNE.

over was to the survivors, I see no more force in that to restrain the words, than if it had been given to particular legatees.

I cannot but say, that I felt a great inclination in myself to have given the testator's will an effect in an event included in the testator's limitation; but the current of authority seems to run so much the other way, that I think myself obliged to declare the limitation over void. The distinctions upon the cases are very nice and subtle; but they tend to establish a rule which will fix the rights of the subject as much as the nature of the thing will admit of (a).

(a) *Vid. ante*, p. 72.

1758.
 24th and 25th
 April.
 S. C.
Perryn, MSS.
Sewell, MSS.

FISHER v. TOUCHETT.

(*Reg. Lib. A. 1757. fol. 432.*)

Court refused to interpose, though under very suspicious circumstances, against creditors who had received goods after a secret act of bankruptcy, there being no actual proof of their having had notice of it.

WILLIAM BELLAMY had been a considerable *Turkey* merchant, and carried on very extensive dealings with the house of *Blackbourne* and Co. From 1752 to 1754 his circumstances had been gradually declining, though it did not appear that *Blackbourne* and Co. were apprised of it. On the 24th of *November*, 1753, they struck a balance of their accounts, whereby it appeared that *Bellamy* was indebted to them to the amount of £5225 15s. From this time their dealings ceased to be as extensive as they had been, and became very trifling.

In *June*, 1754, the ship *Reynolds* arrived from *Aleppo* with a large cargo of goods on board, partly on the account of *Bellamy*, and partly of other persons. On

the 12th of *August*, 1754, a fresh balance was struck between *Bellamy* and *Blackbourne* and Co. whereby it appeared that the former was indebted to them to the amount of £4225.

1758.
FISHER
v.
TOUCHETT.

On the 31st of *August*, all the cargo having been landed except what belonged to *Bellamy*, he sold and delivered to *Blackbourne* and Co. part of his share of it, consisting of sixteen bales of raw silk. He also on the same day sold and delivered to one *Kirkman* another quantity of raw silk of the value of £3528 7s. for which *Kirkman* gave him two notes, the one for £1764, payable in seven months, the other for £1764 7s. payable in nine months. These notes *Bellamy* immediately indorsed and delivered over to *Blackbourne* and Co.: the same evening he absconded.

For the plaintiffs it was proved that he had committed several acts of bankruptcy between the 20th and 27th of *March* preceding; on the other hand it was positively sworn that *Blackbourne* and Co. had no notice of them. They afterwards became bankrupts, and this was a bill brought by the assignees of *Bellamy* to recover the sixteen bales of silk, and *Kirkman*'s notes.

The *Attorney-General*, Mr. *Sewell*, and Mr. *Wilbraham*, for the plaintiffs.

The transaction is so affected with fraud, that no court of equity can suffer it to stand. Acts of bankruptcy were committed in *March*, 1754; the dealings between the parties suddenly cease, and nobody is paid but the house of *Blackbourne* and Co. This is not such a *bonâ fide* transaction as to come within the protection of the 19 Geo. II. c. 32. This is not like the cases where the court has refused to act against creditors for valuable consideration, for there money was actually paid; but in the present case the goods were delivered only in satis-

1758.
 ~~~~~  
 FISHER  
 v.  
 TOUCHETT.

faction of a debt due on account, and in those cases the goods were sold and paid for after the bankruptcy.

The *Solicitor-General*, Mr. *Perrot*, and Mr. *de Grey*, for the defendants.

The defendants do not intend to avail themselves of the section in the act of 19 *Geo. II.* but rely upon that fundamental principle of this court, which refuses to interpose against a creditor, or purchaser, for valuable consideration without notice. Such person can only be prejudiced by leaving the goods in the vendor's possession. *Abery v. Williams*, 1 *Vern.* 27. *Wilker v. Boddington*, 2 *Vern.* 599. *Brown v. Williams*, 2 *Ch. C.* 136. *Wagstaff v. Read*, *ib.* 156. *Small v. Oudley*, 2 *P. W.* 427. The circumstances of fraud amount to nothing more than suspicion.

*The Lord KEEPER.*

The question is, whether this is a case in which this court can interpose; that is, whether the defendants have not an equal equity to retain these goods, as the plaintiffs have to bring a bill for the value of them?

On the one side there is a clear bankruptcy, antecedent to the delivery of the goods on the 31st of *August*, 1754; and on the other side, there is as strong a negative proof as is possible, that the partnership bought the goods, and accepted the bills, by payment for them in account, without notice of *Bellamy's* being either a bankrupt or insolvent. It is a fact proved positively by two witnesses, who must be perjured, if the account they give be not true. The plaintiff has examined and credited one of them, and they are both of them competent, and unimpeached in their characters.

It is very true that the transactions are extremely suspicious. Before *November*, 1753, the mutual dealings

were very extensive every month quite down to that time; the balance is then £4000 and upwards: from that time there are no dealings of any comparison with their former course of dealings: those are stopped at the 19th of *March*, 1654, when the balance is £4225. Both the balances are acquiesced in against a man that paid nobody, till the arrival of the *Turkey* ships, when he paid them, and the same night run away from all the rest of his creditors.

There is, therefore, I think, sufficient grounds for suspicion; but I sit in a court of conscience, and not in a court of conjecture. I must judge *secundum allegata et probata*; and I know nothing that would be so dangerous to the rights of the subject as for a judge sitting here, to overlook legal evidence, and throw into the other scale his own suspicions and conjectures; and the evidence is, that they took these goods *bonâ fide*, without notice of the insolvency.

This brings it therefore to a common principle in this court, that wherever a purchaser or creditor, for valuable consideration, has got possession of a security or satisfaction for his debt, a court of equity cannot take it from him, unless there is a superior equity on the other side. In *Brown v. Williams*, a purchaser *bonâ fide*, and for valuable consideration, without notice of the bankruptcy, was held by Lord Keeper *North* not liable to discover; but plaintiff was left to take what remedy he could before the commissioners, or at law, and the same was determined in the case of *Wagstaff v. Read*. There seems to me no distinction between these cases and the present, except that which was made by Mr. *Attorney-General*; but that does not satisfy me.

It was said, that these were cases where cash was actually paid, but that here the goods were delivered only in satisfaction of a debt due on account; but I know no difference between ready money paid, and the balance of

1758.  
FISHER  
v.  
TOUCHETT.

1758.

FISHER

v.

TOUCHETT.

an account received in satisfaction. For so far, I pay money by lessening the balance due on account. And it was further said, that in the former cases the goods were sold and paid for after the bankruptcy. This case is in effect the same, the goods are advanced as sold after the bankruptcy, and the bankrupt is paid for them out of the balance of the account; and I think the equity is the same, whether the person becomes the possessor by payment in money, or by the balance of an account then due.

Those bills were brought by persons having a legal remedy, and for a discovery only, which the court refused. It seems odd to say, that where a person had a legal remedy, the court refused the discovery, which is an equity consequential to a legal right, and auxiliary thereto in aid against the fraud; but if a man has, through accident, or by laches, lost his legal remedy, that you shall not only give him discovery, but relief also. This would be to carry it further than the cases have hitherto gone.

But it is a question with me, whether there is any difference in this court, where a person has or has not a legal right. I think there is none, because the jurisdiction of this court is not stopped by any circumstances relating to the plaintiff, but from the circumstances relating to the defendant; for how can a court of conscience take from an innocent purchaser what he has got possession of? Suppose a bankrupt had a mortgage term in a trustee, and was to direct an assignment to a creditor *bonâ fide*, and without notice, here this court would not interpose, and there could not be any remedy at law.

I do not see why the plaintiffs are without remedy at law. Suppose here that the goods of the plaintiffs are delivered to a person having no right, who turns them into money, and then becomes bankrupt. The assignees are invested with all the bankrupt's rights, as debtor and creditor; and therefore I cannot see why the plaintiffs

have not a remedy at law. But if they have not a remedy at law, it does not therefore follow that they have a remedy in this court.

In this case I think myself not authorized to take from these defendants what they have got possession of *bonâ fide*, and without notice, and therefore this bill must be dismissed (a).

There is no occasion for me to give my opinion upon the act of 19 *Geo. 2.*; if there were, I should think that it would not apply to this case.

(a) A purchaser, for valuable consideration, without notice of the act of bankruptcy, shall not be obliged in equity to discover any thing that may hurt his title. To the cases cited in the argument may be added that of *Collet v. De Gols*, *For. 65*, where Lord Talbot decided that, if a mortgage of a legal estate be made before an act of bankruptcy, and the mortgagee make further advances after, but without notice, the assignees cannot compel a re-

demption without payment of all the money advanced. The dictum, however, of Lord Redesdale, in *Latouche v. Lord Dunsany*, 1 *Sch. & Lef.* 152, the observations of Lord Eldon, as reported in *ex parte Knott*, 11 *Ves.* 609, and the decision of Lord Erskine in *ex parte Herbert*, 13 *Ves.* 183, appear to have overruled that case. *Vide Mr. Sugden's observations upon these cases.* (*Vend. & Purch.* 721.) and *Eden's Bankrupt Law*, 267.

## PARTRIDGE v. GOPP.

(*Reg. Lib. B. 1758, fol. 72.*)

EDWARD GODFREY, by his will, bequeathed (among other legacies) £6000 to trustees upon trust, to pay the interest to Sarah Washford, afterwards Sarah Clarke, for life; and after her decease to pay the same among marriage, to the others as a voluntary gift, and afterwards dies insolvent, having received assets; on a bill by the legatees, the voluntary gifts were considered fraudulent, but those daughters being also legatees, they were permitted to retain in part of their legacies, subject to abatement.

1758.

FISHER

v.

TOUCHETT.

1758.

10th of July,  
20th of Nov.

S. C.

*Amb.* 596.

*Perryn MSS.*

Executor advances sums of money to his daughters *pendente lite*, to two of them on their

1758.

PARTRIDGE  
v.  
GOPP.

her children, by her then present or any future husband. He also gave legacies to each of the four daughters of *John Shewell*, and constituted *Catharine* his widow, and the said *John Shewell*, his executors.

A bill was filed by the present defendants, *John Clarke*, and *Sarah* his wife, against the executors and other persons claiming under the will, for an account, and to have the above sum of £6000 secured. By a decree made the 22d of *July*, 1736, an account was directed against the executors; on the 7th of *July*, 1744, another decree was made to carry on the former accounts, for an account of the real estate, and for the legatees to abate in proportion. By an order made the 14th of *August*, 1745, *John Shewell* was ordered to pay £3000, part of the estate of *Edward Godfrey*, into the Bank of *England*, on or before *Michaelmas* then next; and by a further order of the 31st of *October*, 1745, he was committed for non-payment to the *Fleet* prison, where he remained till his death, which happened in 1749. By a report made by the Master, dated 4th of *August*, 1753, it appeared that there was a considerable balance in *Shewell's* hands due to the estate of *Edward Godfrey*; upon which a decree was made 27th of *October*, 1753, for an account of his personal estate, and his freehold and leasehold estates to be sold.

It appearing that in the years 1743 and 1744, *John Shewell* had advanced £500 to each of his four daughters the legatees, under the will of *Edward Godfrey*, a bill of revivor and supplement was filed against *Gopp*, who had married one of the daughters, since deceased, *Elizabeth Edwards*, another who had married *Henry Edwards*, deceased, and against *Sarah* and *Catherine*, two unmarried daughters, praying that the former suits might be revived, and that the said sum of £500 each, so advanced by *John Shewell* to his daughters, might be replaced to *Shewell's* estate, or taken as payment of part of their legacies under *Godfrey's* will.


The defendant *Gopp*, by his answer, admitted that *Shewell* on his marriage with his daughter 4th of November, 1744, gave him £500 as a portion, which he said was in pursuance of an agreement entered into before marriage. The defendant *Catherine Edwards* also said, that her late husband, on his marriage with her, 26th of October, 1743, received £500 as a portion, in pursuance of an agreement before marriage. The unmarried daughters said, that in December, 1743, their father made them a free gift of £500 each, for their maintenance and subsistence. They all denied that the above sums were advanced to them as any part of their legacies under the will of *Edward Godfrey*, or that they were part of the estate of *Edward Godfrey*; and denied all knowledge of the bad circumstances of *Shewell* at the time of the respective gifts. There was no evidence.

Mr. *Sewell* and Mr. *Jones* for the plaintiffs.

The advancement of the sums of £500 must be considered as payment in part of the legacies left by the will of *Edward Godfrey*; and therefore, inasmuch as they have received beyond their proportions, the defendants must refund. But if it should be held that the payment of the above sums are not in respect of those legacies, yet as *John Shewell* was insolvent at the time he made those advances, they must be considered as fraudulent with respect to the other legatees of *Edward Godfrey*, who are creditors of *John Shewell*, and therefore void by the statute of 13 *Elizabeth*.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Comyn*, for the defendants.

The only evidence given of the transaction which is sought to be impeached is from the answers of the defendants, which having been read for the plaintiffs, must be considered as true. It is expressly denied by all of them, that the payment of those sums was in respect of their legacies; they cannot, therefore, be called upon to

1758.  
  
 PARTRIDGE  
 v.  
 GOPP.

1758.  
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 PARTRIDGE
 v.
 GOPP.

refund. As to the sums given with the married daughters, that transaction cannot be held fraudulent. They were upon the consideration of marriage, which is always respected in this court as a valid consideration. The advancement of the sums to the unmarried daughters ought not to be looked upon in the light of mere voluntary payments: they were advancements from a father to his child, and as such, are only the paying off of a debt of nature; but every voluntary gift is not fraudulent. All the defendants swear that they were unacquainted with the embarrassed state of *Shewell's* circumstances. Gifts of personal estate within the statute, must be such as are made with an intent to defraud creditors: there must be a secret trust for the donor. The statute is different as to real estate; for the estate remains, and cannot be consumed as personal estate. Money may be spent and gone, and therefore the gift being voluntary, is sufficient evidence of fraud as to land, but not as to money.

The Lord KEEPER.

Nov. 20.

The general question is, whether the several sums given by an insolvent executor *pendente lite* to his children, are to be refunded, or taken as payments of so much of the legacies given to them by the testator.

First, the plaintiffs insist that this was a gift within the statute of 13 *Elizabeth*, to defraud creditors; or, secondly, that there being a debt due from the executor (who had received assets) to the legatees, it must be considered as a payment *pro tanto*. The counsel for the defendants insist it was not fraudulent, because no secret trust; nor voluntary, it being the payment of a debt of nature.

The proof of the defendants receiving these sums being drawn from their answers, I must take the entire account there given of it; and the defendants *Gopp* and *Edwards*, there swearing that the two sums of £500 each

respectively received by those defendants were paid and received as marriage portions, they were purchasers for a valuable consideration, and this court cannot interpose to wrest it out of their hands; as against the defendants *Gopp* and *Edwards*, therefore, the bill must be dismissed.

As to the two other defendants, *Catherine* and *Sarah Shewell*, they insist, that in *December*, 1743, their father made a gift to them of £500 each for their maintenance and subsistence. It struck me at first as a matter of hardship, that a child advanced by his father, should be called on to refund a sum of money (perhaps spent), at the peril of his liberty; especially as such a gift could not be considered here as a trust for the giver: but on the best consideration, it appears to me that, as the law now stands, no man has so absolute a power over his own property, as that he can alienate the same, when such alienation directly tends to delay, hinder, or defraud his creditors, unless it be made on good consideration, and *bonâ fide*. By the 13th *Elizabeth*, the only consideration as to the validity or invalidity of these alienations depends on the intent and conduct of the party making them, and not on the motive with which they are received; for they are made void although the party accepting be entirely innocent in the transaction; and the party accepting is not to be punished for that, or for insisting on the gift or grant to him made, but is punished only for putting it in use, being privy to, and knowing the motive and end for which it was made; therefore, it is clear that the statute is not confined singly to the case of a secret trust.

Then the question is, *quo animo* the gift or grant was made. The proviso at the latter end of the statute, which is in the nature of an exception, shews the meaning and extent of the enacting part. It is not to extend to alienations made for good consideration, and *bonâ fide*;

1758.

PARTRIDGE
v.
GOPP.

No man has so absolute a power over his own property, as that he can alienate it when such alienation tends to delay, hinder, or defraud his creditors, unless it be made on good consideration, and *bonâ fide*.

By the 13 *Elix.* the only consideration as to the validity or invalidity of alienations, depends on the intent and conduct of the party making them, and not on the motive with which they are received.

1758.

PARTRIDGE

v.

GOPP.

Volunteers are made by the statute responsible to the creditors of the giver, though not to the giver himself.

but blood is not a good consideration. Nor can an alienation be made *bonâ fide* and voluntarily, where a man is largely indebted at the time. For every man ought to be just before he is generous. If this be therefore the law, the subject is apprized of it, and volunteers must consider themselves such as they are made by the statute, responsible to the creditors of the giver, though not to the giver himself; and it seems more reasonable that a gift should be fettered in this manner, than that creditors should be left to the mercy of ill-disposed debtors.

In the circumstances and situation of Mr. *Shewell*, I can have no doubt but that this voluntary advancement of his children proceeded from affection getting the better of justice. If he had been solvent at that time, he should have paid the legacies he owed, and then advanced; but if he had paid the legacies, they must have refunded in proportion by the common equity of this court; therefore, the transaction seems to smell strong of craft and experiment. There are besides circumstances of fraud that accompany it. The transaction was secret; no witness, no receipt, no entry, and *dona clandestina sunt semper suspiciosa* (a). It was *pendente lite*, when he must have been apprized of his circumstances, and plainly see the tendency of this transaction; and therefore I am of opinion, that if the defendants only stood in the capacities of donees only, that this gift would have been void, and they must have refunded. But I think the husbands are entitled to retain as purchasers under their marriage settlements, and that the bill must be dismissed as against them with costs; and as to the unmarried daughters, as they are both donees and legatees of *Godfrey*, they have a right to retain in part of their legacies, and then they will be subject to the provisions and directions of the

(a) Vide *Twyne's case*, 3 Co. 81.

former decree; and there must be an abatement in proportion.

Note by Mr. Ambler.

Mr. *Wilbraham* seemed to think that his lordship laid down the position too large, and therefore asked him in court, for the information of the bar, whether he did not mean to confine it to the circumstances of this case? That otherwise a parent could not make any present whatsoever, of ever so small value to his child, without its being liable to be taken away in favour of creditors. To which his lordship said, that the fraudulent intent is to be collected from the magnitude and value of the gift (*a*).

(*a*) This case in respect of the *subject* of relief, has gone further than any other, (vide *Roberts* on Fraudulent Conveyances, 416, *et seq.*) and see the case of *Duffin v. Furness*, *Vin. Ab. tit. Fraud. F. pl. 27.* where a man much indebted gave £600 for the benefit of his younger children six hours before his decease, which was held not fraudulent. In *Fletcher v. Sedley*, 2 *Vern.* 490, 1 *Eq. Ab.* 149, where a bill of sale was set aside as fraudulent, the same opinion is thought to have been expressed by the court; but Lord *Hardwicke* (1 *Ves.* 120) observed, that “that was only the inclination of the court on argument of counsel, and it would be dangerous to allow the arguments which are there.”

ENGLAND v. CODRINGTON.

(*Reg. Lib. A. 1758. fol. 535.*)

1758.
21st & 22d Nov.

THIS was a bill brought by the plaintiffs (all of the name and family of *England*, who were entitled to certain Conveyances held upon the circumstances and answer of defendant to be mortgages, and not absolute conveyances; and defendant having insisted upon their being absolute conveyances; plaintiffs were allowed to redeem with costs.

1758.

ENGLAND

v.

CODRINGTON.

premises at *Marshfield* in the county of *Gloucester*, under various family transactions) against Sir *William Codrington*, for an account of the rents and profits, and a redemption, &c.

The bill stated that the several estates which were the subject of it, being under various mortgages, and the mortgagees being impatient for the money, *William* and *John England*, two of the plaintiffs, having refused an offer of £1600 from *Thomas Evans*, one of the mortgagees for that part of the estate which was in mortgage to him in *May*, 1751, had applied to *Stephen Simpson*, an attorney, to relieve them from their embarrassments, who promised to apply to the defendant to advance them sufficient for that purpose. That they afterwards with *Simpson* waited upon the defendant, who assured them that he would stand their friend, and assist them with money on the said estate at four and a half per cent., and advance some money to lie as a reserve in their hands, to answer the year's interest ; mentioning at the same time his expectation of the plaintiffs repaying him again in a year after the defendant should have paid off the said *Thomas Evans*, which the said plaintiff agreed to ; and *Simpson* declared that the deeds must be drawn (as the other mortgages had been) as absolute conveyances to the defendant. That upon that *Simpson* produced a paper writing ready drawn by him, without any direction, from the plaintiffs, or acquainting them therewith, and which he read to the plaintiffs and defendant : that upon the plaintiffs objecting, that they ought to have a note of *defeasance*, *Simpson* answered that the defendant should give nothing under his hand, but should give his word for their liberty of redeeming the premises at the time prefixed. Upon which the defendant declared that he would take no advantage of the plaintiffs from his not signing a *defeasance* note : but in case the plaintiffs paid him the money to be advanced by him, and charges of

the writings, with interest at the year's end, he would accept thereof.

That the defendant, on the 30th of *September*, 1751, paid off *Evans*, to whom it was proved that he acknowledged that he had given the plaintiffs liberty to redeem; and afterwards paid off the other mortgagees, and received assignments from them.

That between that time and the *Michaelmas* following, the defendant permitted the plaintiffs, in several instances, to treat the premises as their own; but that in *April* the defendant gave notice to some of the tenants to stop payment of the rent to the plaintiffs till the then *Michaelmas* next, for that it would be then seen whether the defendant was paid off, and to whom the tenants were to pay their rents; and at the same time took a bill of sale from the plaintiff *Elizabeth*, the mother of the other plaintiffs, and a joint bond from them all, for £60.

The bill then stated (which were also proved in evidence) several refusals and evasions of *Simpson* and the defendant to give any information to the plaintiffs of the state of the accounts, &c.; that they had been turned out of the premises by ejectment, and that *Simpson* was dead.

The defendant by his answer set forth the agreement, which was as follows:—"18 *July*, 1751. In consideration that Sir *William Codrington* has agreed to advance and pay to us, whose names are underwritten, £2400 on or before the 20th day of *August* next, in order to pay off and discharge such sums of money as are due from us to *Thomas Evans*, &c. as well as to supply our other occasions; we do hereby severally covenant, contract, promise, and agree, that we, as well as *Thomas Evans*, &c. shall and will, on payment of the said sum of £2400, grant, release, and convey unto the said Sir *William Codrington* and his heirs for ever, all and every our, and each of our, and his, her, and their, and each of their separate and respective estate and estates, of, into, or out

1758.

ENGLAND

v.

CODRINGTON.

1758.

ENGLAND

v.

CODRINGTON.

of all and every the messuages, lands, tenements, and hereditaments of us, or either of us, &c. situate, &c. and which have been granted or conveyed by us only, or by us and any other person, to the said *Thomas Evans*, &c.

Witness,

*Wm. England,**Stephen Simpson.**Jo. England."*

That he had thereupon advanced the said sum of £2400, which he insisted was the full value of the estate, &c. The answer then set forth the several conveyances and assignments, and insisted that the transaction was an absolute purchase.

As to the circumstances attending the transaction, the defendant stated that on *Simpson's* (who was his agent) applying to him to advance money on the security of the premises as a loan, the defendant refused; but directed *Simpson* to treat with the plaintiffs for the purchase, if they were inclined absolutely to sell, which *Simpson* accordingly did.

That *Simpson* advised defendant not to lend the plaintiffs any money, or to become mortgagee; but that defendant has some remembrance that during the treaty *Simpson* informed him, that the plaintiffs expressed some unwillingness to make an absolute sale of their estates, as they might, by means of a marriage of the plaintiff *John* with a woman of fortune, be enabled to redeem the same. That *Simpson*, apprehending it was not probable that the plaintiff *John*, in his then circumstances, would (at least in the space of one year) marry any person whose fortune should amount to the purchase-money so paid by the defendant, the defendant believes that *Simpson*, before the signing the contract, did declare to the plaintiffs that if the plaintiff *John* should, within one year after making the said agreement, marry a person of fortune, and be thereby enabled to redeem or purchase the said premises, and accordingly with his wife's fortune repay the defendant the money which he should pay for the

purchase thereof, and interest, and charges; that he, the said *Simpson*, apprehended that the defendant would reconvey and assign the estates unto them. And that though the said declaration (if any such was made by the said *Simpson*) was without the privity or directions of the defendant, yet the said *Simpson* having, as the defendant believes, informed the defendant that he had made such declarations to the plaintiffs, the defendant thinks it probable (though he cannot with certainty say) that he did or might give, or express his assent thereto; and saith that if the plaintiff had married a person within one year after the date of the agreement, and had within such time tendered the sum of £2480, with interest and charges, the defendant would have accepted the same, and conveyed the estates to them, as he should have conceived himself bound in honour to have done; although he is advised that he could not have been compelled thereto, as what passed between *Simpson* and the defendant was not reduced to writing; nor did, as the defendant apprehends, amount, or could be construed to amount, to more than an intimation of the defendant's intention to accept such money upon the terms aforesaid. That the plaintiff *John* had not married, and that therefore the plaintiffs are not entitled to redeem.

The *Attorney-General* and Mr. *Wilbraham* for the plaintiffs.

The *Solicitor-General* and Mr. *Perrot*, for the defendant, cited *Mellor v. Lees* (a), and *Floyer v. Lavington*, 1 P. W. 268.

The Lord KEEPER.

I am of opinion, upon the proofs in this cause, and particularly from the answer of Sir *William Codrington*, that the agreement, bearing date the 18th of *July*, 1751, was not for the sale of the premises therein mentioned,

(a) 2 *Atk.* 494.

1758.

 ENGLAND
 v.
 CODRINGTON.

1758.
 ENGLAND
 v.
 CODRINGTON.

but was only an agreement to convey the estates to Sir *William* and his heirs, redeemable at a certain time, and particular event, upon payment of the money with interest, which ought to have been inserted in the agreement; and appears to me to have been fraudulently omitted by the drawer of it.

I am therefore of opinion that the conveyances are not to be considered in this court as absolute conveyances, but as securities for the money advanced by Sir *William Codrington*, together with interest, according to the rate of interest which the several mortgages paid off by him bore; and the defendant having insisted on the same as absolute conveyances, contrary to the real truth of the transaction, and thereby occasioned this suit; let the Master tax the plaintiffs their costs to this time, &c. Usual decree for an account, &c. (a)

(a) *Vide Spurgeon v. Collier, ante, 60.*

1759.
 22d January.
 S. C.
 Amb. MSS.
 cit. 3 Wils. 270.

Ex parte JACOB and others.—In the Matter of
 NELSON.

(*Sec. Lib. 1758-9. fol. 75.*)

Covenant in marriage articles, that in case the wife should survive the husband, or he should leave any issue by her, his heirs, executors, and administrators, should raise £500, &c.: held, upon a petition by the trustees to be admitted as creditors under a commission of bankrupt

against the husband, that the debt was contingent, and not proveable, though a warrant of attorney to confess judgment had been granted previous to the bankruptcy, and judgment entered up. *Sed quæ?*

ON the marriage of *Nelson* the bankrupt, articles were entered into, bearing date the 2d of *August*, 1751, between *Mary Nelson*, *John Nelson*, the bankrupt, *Zachariah Nelson*, and *Joan Nelson*, children of the said *Mary*, of the first part; *John Jacob* and *Ann Jacob* of the second part; and the petitioners, *John Jacob* the younger, *John Coulsen*, and *John Arden*, of the third part; and thereby reciting the intended marriage of the bankrupt with the said *Ann Jacob*, and that the said *John Jacob* had agreed to advance the sum of £600 as a marriage portion; the said *John Nelson* covenanted (*int. alia*),

that in case the marriage should take effect, and his wife should survive him, or the said *John Nelson* should leave any issue begotten by him on the body of his said intended wife, that his heirs, executors, and administrators should, within one month next after his death, pay or cause to be paid to the petitioners the sum of £500 in trust, to lay out the same at interest, and apply the produce to the use of his said intended wife for life, and after her death to apply the said sum of £500, and interest then due, to and amongst all and every one or more children of the said *John Nelson* by the said *Ann*, in such shares and proportions as they should jointly appoint, and in default of appointment, in trust, to apply the interest and produce for the maintenance of the child or children of the said marriage as the petitioners should think fit, until their age of twenty-one or marriage; but if there should be no such child living at the death of the survivor of the said *John Nelson* and *Ann* his intended wife, or all should die before twenty-one, or marriage, then the said sum of £500 was to be paid to the said *Ann*, her executors and administrators, in case she survived her said intended husband.

The marriage took effect, and the portion was paid: and on the 7th of *February*, 1758, *Nelson* gave the petitioners a warrant of attorney to confess judgment for £1000, as a collateral security for the £500, and judgment was entered up accordingly. Besides the portion, the bankrupt, after the marriage, received a further sum of £500, which was a legacy given to his wife.

A commission having issued against him, the petitioners offered to prove the debt of £500 under the commission, but were refused by the commissioners; and afterwards, and before any dividend was made, the bankrupt died, leaving the said *Ann*, and *John Nelson*, his only son, a minor.

1759.

Ex parte
JACOB

and others.—In
the Matter of
NELSON.

1759.

Ex parte
JACOB
and others.—In
the Matter of
NELSON.

This was a petition by the trustees to be admitted creditors under the commission for the sum of £500.

The Lord KEEPER

Considered that it was a contingent debt at the time of the bankruptcy, and not proveable under the commission, and accordingly dismissed the petition.

This case has been inserted as being the anonymous case referred to in 3 *Wils.* 271, and *Co. B. L.* 242. It is taken from Mr. *Ambler's MSS.* which the editor has compared with the secretary's book. There is no note of it among the *Lord Keeper's MSS.*, and it does not appear to have been much discussed. It is certainly contrary to the authorities. For though contingent demands cannot be proved under a commission taken out before the contingencies on which they are made payable have taken effect; *Tully v. Sparks*, *Ld. Raym.* 1546. *Str.* 867. *Ex parte Caswell*, 2 *P. W.* 497. *Ex parte Bailey*, cit. *ib.* *Ex parte Jeffries*, 7 *Vin. Ab.* 72. *pl.* 7. *Ex parte King*, *Dev.* 254. *Ex parte Greenaway*, 1 *Atk.* 113. *Ex parte Groome*, *ib.* 115. *Ex parte Michell*, *ib.* 120. *Ex parte Hill*, *Co. B. L.* 238. *Ex parte Bennet*, *ib.* 239. *Ex parte Murphy*, 1 *Sch. & Lef.* 44. *Ex parte Alcock*, 1 *Ves. & Be.* 176. 1 *Rose*, 323; yet if there is a remedy at law, before the bankruptcy, as where, by way of security, the party covenants to pay money immediately, or gives a bond with a penalty, and there is a breach of the covenant, or the penalty is forfeited at law, before the bankruptcy, the court will take hold of the legal right to enable the trustees to come in as creditors under the commission. *Ex parte Winchester*, 1 *Atk.* 116. 9 *Mod.* 471. *Ex parte Mare*, 8 *Ves.* 335. Or if the bankrupt confesses a judgment for it (as in the present case), which is an immediate debt at law, notwithstanding a defeazance, *Ex parte Smith*, 1 *Atk.* 117.

121. Mr. *Ambler*, in a note to his report of the present case, cites *Ex parte Beavais*, before Lord *Talbot*, to the like effect, and *Ex parte Madock*, December, 1772, which was a bond and judgment, in case husband fail to pay wife, &c. and order to admit proof without prejudice to any remedy assignees might be advised to take. The law upon this subject is now, however, much altered by the 6 Geo. 4. c. 16, s. 56, by which contingent debts are made proveable. *Vide Eden's Bankrupt Law*, 125.

1759.

Ex parte
JACOB

and others.—In the Matter of NELSON.

BURGESS v. WHEATE.

The ATTORNEY-GENERAL v. WHEATE.

(Reg. Lib. A. 1758. fol. 420.)

The Lord KEEPER.

Lord MANSFIELD, C. J.

The Master of the ROLLS.

13th, 14th, and 15th December. 1757.

24th January, 1759.

S. C.

Black. Rep. 121.

Amb. MSS.

Core MSS.

Hill MSS.

LAWRENCE BATHURST being seised in fee of the manor and advowson of *Lechlade* in the county of *Gloucester*, by indenture made the 10th of December 1668, bargained and sold certain part of the premises called *Rudmore* and *Aske-Mill*, &c., to trustees for the term of one thousand years upon trust, to assign the same in such manner as he should appoint, and till such appointment, in trust for himself, his executors, administrators, and assigns. *A. being seised in fee, ex parte paternâ*, conveys to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, &c., and for no other use, intent or purpose whatsoever:

A. dying without appointment, and without heirs ex parte paternâ; held, *per Lord Keeper* and the *Master of the Rolls*, 1st, that the maternal heir was not entitled; 2dly, that, there being a *terre-tenant*, the crown, claiming by escheat, had not a title by *subpœna* to compel a conveyance from the trustee, the trust being absolutely determined; no opinion being given upon the right of the trustee: *per Lord Mansfield*, C. J., 1st, that the heir *ex parte maternâ* was not entitled; 2dly, that, from the analogy between trusts and legal estates, the crown was entitled by escheat; but that, if the conveyance had barred the crown of its right, as between the maternal heir and the trustee, the former was entitled.

1757-9.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

By indenture bearing date the 26th of *March*, 1670, he mortgaged the said premises for five hundred years for securing the payment of £400.

Soon after this he died, leaving issue Sir *Edward Bathurst* his only son and heir, and two daughters, *Ann* and *Mary*; and the premises descended to Sir *Edward*, subject to the above mortgage as to part. By his will he made his widow *Susannah* his sole executrix, who thereby became entitled to the said term of one thousand years.

By indenture bearing date the 20th of *February* 1672, in order to secure the further sum of £1860, she assigned over the residue of the thousand years term.

These several terms afterwards became vested in *John Chandler*. Sir *Edward* died an infant, and without issue, in consequence of which the freehold and inheritance, subject to the said terms, descended to *Ann* and *Mary*, his sisters and coheiresses. *Ann* intermarried with *John Greening*, and *Mary* with *George Coxeter*, and thereupon the husbands and wives became entitled to this estate in undivided moieties.

John Greening and his wife made a settlement of their moiety *August* 21, 1686, and covenanted to levy a fine to the use of such persons as they should jointly appoint by any deed or will duly attested, and for want of such appointment, to themselves for their lives and the life of the survivor; remainder to the heirs of their bodies; remainder to the right heirs of the survivor.

In *Michaelmas* term 1689, *George Coxeter* and his wife filed a bill for a partition of the estate; and the usual directions were given on the decree, and also that the incumbrances should be discharged in equal moieties. Afterwards an allotment was made by commission, and *Greening* and his wife being dissatisfied with their allotment, applied to the court for a new commission; but the other sister agreeing to give up her allotment, and to

make an exchange with her sister, the allotments were exchanged, but no conveyances were executed.

In *March* 1693 *Ann Greening* died, without having joined her husband in any appointment; in consequence of which the husband, by the settlement of 1686, became entitled to her moiety. In *December* 1694 he died without issue, and the estate descended to *Elizabeth Greening*, his niece and heir *ex parte paternâ*, being the only child of *Thomas Greening*, his eldest brother.

Elizabeth Greening afterwards married *Nicholas Harding*, and previous to the marriage, a settlement was made, the 15th and 16th of *August* 1695, of this moiety to the use of the husband for life, then of the wife for life; remainder to trustees to preserve contingent remainders; remainder to trustees, on a trust for ninety-nine years, which never arose; remainder to the first and other sons in tail male successively; remainder to trustees for five hundred years, on trusts that never arose; remainder to the right heirs of *Elizabeth Greening*.

In *Michaelmas* 1695, *Harding* and his wife brought a bill to perfect the partition, and to divide other lands omitted in the former partition. A decree was accordingly made for mutual conveyances, and a commission issued to divide the rest of the premises; and in *January* 1698 conveyances were mutually executed.

George Coxeter died, leaving *Mary* his wife surviving him, and there being a large sum then due to *Chandler*, she, by deed and fine, conveyed a moiety of the said mill, lands, and premises to trustees and their heirs, in trust for *Chandler* and his heirs, and *Nicholas Harding* and *Elizabeth* his wife agreed to convey the other moiety to the same trustees, in trust for *John Chandler* and his heirs, and the said *John Chandler* and his trustees were, in consideration of £150, to re-convey to him, the said *Nicholas Harding* and his heirs, the said mill, &c.

1757-9.

BURGESS

v.

WHEATE.

The

ATTORNEY-
GENERAL

v.

WHEATE.

1757-9.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

By indenture bearing date the 26th and 27th of *February* 1713, *Nicholas Harding* and *Elizabeth* his wife conveyed their moiety of the said mortgaged premises to the trustees and their heirs in trust, for the defendant *James Chandler* (the son of *John Chandler*, then deceased), and his heirs, who with the personal representative of *John Chandler* covenanted that they would at any time thereafter, at the request and charges of the said *Nicholas Harding* and *Elizabeth* his wife, assign and convey the said several terms, and the inheritance of the said mill, &c., to the said *Nicholas Harding* and *Elizabeth* his wife, or the survivor of them, and the heirs and assigns of such survivor. No assignment was ever made of the said terms, nor did the trustees make any conveyance of the inheritance.

By indenture bearing date the 11th of *January*, 1718, (there being no issue of the marriage,) made between *Nicholas Harding* and *Elizabeth* his wife, of the one part, and Sir *Francis Page* and *Robert Simmons* of the other part, reciting the settlement of the 16th of *August*, 1695, and covenanting to levy a fine to assure the premises to the use of the daughters of the marriage, as tenants in common; and, in default of such issue, to *Page* and *Simmons* and their heirs, in trust for the said *Elizabeth Harding*, her heirs and assigns, to the intent that she might at any time during her life, without her husband's concurrence, dispose of the reversion of the moiety aforesaid to such uses, &c., as she should by her will, or other writing, appoint, and for no other use, intent, or purpose whatsoever. A fine was accordingly levied.

There was no daughter of the marriage; Mrs. *Harding* survived her husband without making any appointment, and without heirs on the part of the father, from whence the land descended. But *Burgess*, the plaintiff, was her heir on the part of the mother.

On the death of Mrs. *Harding*, Sir *Francis Page*, the surviving trustee, got into possession; and in *July*, 1739, the bill in the first cause was filed against him by *Burgess*, and, on Sir *Francis*'s death, it was revived against his personal and real representatives. It prayed that, if there was any legal interest in Sir *Francis Page*, he might be compelled to convey to plaintiff, deliver up possession, and account for the rents and profits. The answer insisted that he was lawfully seised of the inheritance of the estate, and entitled to the rents and profits.

1757-9.
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

On the 14th of *July*, 1741, the cause came on to be heard before Lord *Hardwicke*, C., who, on the pleadings being opened, objected to the *Attorney-General*'s not being a party. Both parties were desirous that there should be no question about the escheat, and the *Attorney-General* did not insist upon it. But the *Lord Chancellor* asking him if he waived any right the crown might have, and would consent that it might be so entered, the cause stood over, and the *Attorney-General* was made a party. It coming on again before Lord *Hardwicke* on the 11th of *February*, 1744, a case was directed to be made for the opinion of the court of *King's Bench*, with the three following questions (a).

First, Whether, by virtue of the indenture of the 11th of *January*, 1718, and the fine therein mentioned, any and what estate in law did pass to *Page* and *Simmons*, or either of them?

Second, In case no estate passed to *Page* and *Simmons*, or either of them, by virtue of that indenture and fine, whether the inheritance of the premises, or any part thereof, did, on the death of *Elizabeth Harding*, descend to *Burgess* as heir at law on the part of the mother?

Third, In case the said deed of the 11th of *January*,

(a) The argument in the rate, is in the *Hargrave MSS.*
K. B., which was very elaborate. No. 85. p. 95.

1757-9.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

[*182]

1718, had not been executed, or the fine levied, but the same were entirely out of the case, whether the inheritance of the said premises, or any part thereof, would have descended to the said *Richard Burgess* as heir at law on the part of the mother? And the consideration of costs and further directions was reserved till the opinion of the judges should be certified.

Upon the 29th of *May*, 1754, the judges of the *King's Bench* (LEE, C. J., being dead) certified their opinion as follows:

To the first question. Upon hearing counsel on both sides, and consideration of the case, we are of opinion that, by virtue of the indenture of the 11th of *January*, 1718, and the fine therein mentioned, the reversion in fee simple, after the death of *Nicholas Harding* and *Elizabeth* his wife, without issue male, did pass to the said Sir *Francis Page* and *Robert Simmons*.

To the second question. In case no estate had passed to the said Sir *Francis Page* and *Robert Simmons*, by virtue of the said indenture and fine, we are of opinion that the inheritance of the premises, or any part thereof, would not, on the death of the said *Elizabeth Harding*, have descended to *Richard Burgess* as heir at law on the part of the mother.

To the third question. In case the deed of the 11th of *January*, 1718, had not been executed, or the fine levied, but the same were entirely out of the question, we are of opinion, that, upon the death of *Elizabeth Harding*, the inheritance of the premises, or any part thereof, would not have descended to *Burgess* as heir at law on the part of the mother. But we are of opinion that, if the mill, &c. had been conveyed to *Nicholas Harding* and *Elizabeth* his wife, and the survivor of them, and the heirs of such survivor, according to the covenant in the release of the 27th of *February*, 1713, they would

have descended to the said *Burgess* as heir at law on the part of the mother.

And we do certify that the late Lord Chief Justice concurred with us in opinion.

Serjeants' Inn,
May 29, 1754.

M. Wright.
T. Denison.
M. Forster.

1757-9.
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

After this certificate was returned, the *Attorney-General*, on behalf of the crown, filed an information, insisting that Sir *F. Page*, by the deed of 1718, had no beneficial interest in the estate in his own right, but was a mere trustee for the benefit of Mrs. *Harding*, or her appointee or heir, and in default of such appointment or heir, that he was a trustee for the benefit of his Majesty, who stands in the place of such heir, and that the premises were escheated, and that the representatives of Sir *F. Page* ought to convey to the use of his Majesty. To this there was an answer put in, and issue joined; and now the first cause came on again for further directions, and the information came on to be heard at the same time.

The *Attorney-General*, the *Solicitor-General*, Mr. *Sewell*, Mr. *Hoskins*, and Mr. *Coxe*, for the crown (a).

Mr. Serjt. *Hewitt* and Mr. *Caldecot*, for the heir *ex parte maternâ*, contended that the case was different from that which was argued in the court of *King's Bench*, by reason of the trust: that Mrs. *Harding* was to be considered as having taken a new estate by purchase from the trustees. *Dyer*, 134 a. *Carth.* 140. That it would be so

(a) There is a remarkably full note of the arguments at the bar in the *Lord Keeper's* note book, and a less exact report in *Ambler's MSS.* As the great question of the es-

cheat was, however, so fully entered into in the very elaborate discussion which the case underwent from the bench, they are here omitted.

1757-9.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

if the trustees had actually conveyed the legal estate to her, as it was a rule in equity that what ought to be done is looked upon as done (*a*).

Lord MANSFIELD, C. J.

I have always understood it as settled and fixed, that the accession of the legal estate to the equitable does not make any alteration in the estate, nor will a conveyance thereof from the trustees to the *cestuy que* trust be a revocation of his will. *Parsons v. Freeman* (*b*), *Sparrow v. Hardcastle* (*c*), founded on a case in *Roll's Abr.* 616, pl. 3.

Mr. Willes, Mr. Perrot, Mr. Wilbraham, and Mr. Aston, for the defendant *Wheate*.

Lord MANSFIELD, C. J., at the sitting of the court on the third day, none of the counsel for the defendant having then spoken, except *Willes*, said, that there might be a difference between the coming in *propter delictum*, and in consequence of the original right of ownership, taking it, that there could not be a forfeiture of a trust under the stat. 33 *Hen.* 8. It was a question, therefore, whether the heir of a felon might not have come into equity against the trustee for a reconveyance—there was no determination in the age of uses that the heir should not have it? It is made a query in 5 *Ed.* 4. *Bro.* title, Feoffment to Uses, 34.

(*a*) This is, what Lord *Thurlow* calls, the *cant expression*, which he thinks should have been abandoned. *wood*, 1 *Vern.* 298, and the notes to those cases: also *Walker v. Denn*, 2 *Ves. jun.* 170.

(1 *Bro. C. C.* 237). *Vide* particularly *Pulteney v. Lord* (*b*) *Amb.* 115. 3 *Atk.* 751. 1 *Wils.* 308.

Darlington, and Mr. *Hargrave's* argument there. *Edwards v. Lady Warwick*, 2 (*c*) *Amb.* 224. 3 *Atk.* 798. And see *Watts v. Fullarton*, *P. W.* 171. *Kettleby v. At-* cit. *Doug.* 718.

Secondly, suppose *Brooke's* query is right, and equity will not execute the trust in favour of the heir of a person attainted, whether the right would not have resulted to the creator of the trust? No notice was however taken of these observations in the arguments, owing, probably, to the counsel not having had time to consider them (a).

The court, being divided in opinion, took time to consider till this day.

The Master of the Rolls (b).

The matters in question between the parties come before the court in two several causes: one is set down for further directions in consequence of a reservation in a decree of the late *Lord Chancellor*, referring a case and several questions to the judges of the court of *King's Bench* for their opinion. They have certified their opinion to the *Lord Keeper*, and he seems inclined to confirm that certificate: and that cause is now set down for further directions.

24 Jan. 1759.

They come before the court in another cause, on an information filed by the *Attorney-General* on behalf of the crown. The attorney was a defendant in the original cause; so that the information here is in the nature of a cross bill.

The case on which the matters arise is this. [Here his Honour stated the case very minutely.]

This is the state of the case, of the cause, and of the several claims of the parties.

(a) *Amb. MSS.*

coincided with Lord Mans-

(b) Mr. Christian, in his
Notes to *Blackstone's Com-*
mentaries, has, by a mistake
observed (Vol. II. p. 246),
that the Master of the Rolls

field, and that the Lord
Keeper determined contrary
to both their learned opi-
nions.

1757-9.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

1759.

BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

I shall now proceed to consider these claims in order.

First: the claims of the plaintiff *Burgess* as heir at law *ex parte maternâ*, in default of an heir *ex parte paternâ*. This claim I see no ground for, considering the certificate of the judges, which *Lord Keeper* proposes to confirm.

The questions stated for *B. R.* have left the point open for the maternal heir, if there was any ground of right, and their answers have effectually precluded him, in case he has no equity. And what ground of equity has he?

What has been insisted on is mere matter of law, and would open the questions again which are concluded. For, by the deed of 1718, it is held he took nothing; that the trustee thereby took the legal estate, and no new use was created by *Mrs. Harding*.

The only thing suggested by that side, which has the colour of equity, is, that *Mrs. Harding* might have prayed and compelled a conveyance from the trustee whilst she lived, by which she would have been seised to new uses; which, in default of heirs *ex parte paternâ*, would have gone to the heirs on the part of the mother: and that it is a rule of equity, "That what ought to be done, or is agreed to be done, is looked upon as done."

Had such a conveyance been executed, it would have been like a feoffment and re-feoffment, and have made her seised of a new use; but, as it was not done, the consequences insisted on will not follow; for nothing is looked upon in equity as done, but what *ought* to have been done, not what *might* have been done. Nor will equity consider things in that light in favour of every body; but only of those who had a right to pray it might be done. The rule is, that it shall be either between the parties who stipulate what is to be done, or those who stand in their place. Here *Mrs. Harding* never prayed

Nothing is looked upon in equity as done, but what *ought* to have been done, not what *might* have been done.

a conveyance, and one cannot tell whether she ever would; and the maternal heir is not to be considered as a privy in blood, but a mere stranger.

This very cause warrants the distinction here taken, i. e. with regard to the mill, &c. mentioned in the opinion on the last question. It stands thus: *Nicholas Harding*, after having agreed to release to *Chandler* the equity of redemption of a moiety of the mortgaged premises, agrees to purchase of *Chandler* the mill, &c. and makes *Chandler* stipulate to convey these premises to him and his heirs, or such person as he shall direct. The equity of redemption was released, and then *Chandler* stipulates to convey to *Harding* and his wife and the survivor of them, and the heirs of the survivor; the consequence is, that Mrs. *Harding* takes this estate, not as the old use, but by purchase, under the appointment of her husband, which enlarges the course of descent beyond that of the old use. And since what is covenanted to be done is considered as done, the mill goes in a course of descent (in default of paternal heirs) to the heir *ex parte maternâ*. In the deed of 1718 there is nothing like such a covenant, nor any thing which shews she intended to enlarge the course of descent. Wherefore under these circumstances, as the opinion of the judges is proposed to be confirmed, I think there is no ground for the claim of the maternal heir.

Secondly, The next claim is on behalf of the crown, to which there are two preliminary objections.

First, That the claim of the crown is premature, there being no office found, or inquisition taken, to find a title in the crown.

There are cases where such previous steps are necessary; where the crown wants to make a seisure, and to take possession of the freehold and inheritance, there its title must appear by matter of record, whether judicial

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-
GENERAL

v.

WHEATE.

1759.

BURGESS
 v.
 WHEATE.
 The
 ATTORNEY-
 GENERAL
 v.
 WHEATE.

or ministerial, or whether the conveyance itself be matter of record, or matter of fact founded on record. This is the constant barrier between the crown and the subject; and the effect of it is, to put the subject on interpleading with the crown by traversing its title, or setting up a better in a *monstrans de droit*, or petition of right. The judgment, if the subject succeeds, is *amoveat manus*; but he loses the intermediate profits which are accounted for in the exchequer. 4 Co. 55. *Barter's Case*, 75. *Finch*, 325. It is the prerogative of the crown not to interplead with the subject before it takes possession; but it is said, may not the crown, where it has a legal title, in lenity to the subject waive that prerogative, and interplead with the subject, as one subject may with another? It is clear the crown may. The office is circuitous, expensive, and attended with the loss of *mesne* profits to the subject. The crown may refuse to alter the possession till the right is determined, and only proceed by information of intrusion, even where it has a legal right, on an office which may warrant a seizure. But the present case is stronger; for if a finding for the crown had been under office and inquisition, it must have been fruitless, ineffectual, and *felo de se*: it must have found all the matters aforesaid, Mrs. *Harding's* seisin; conveyance to, and legal title in *Page*; and an inquisition will not entitle the crown to seize where there is a legal title in possession in another. The crown might have recourse to equity, if the crown has any equity.

An inquisition
 will not entitle
 the crown to
 seize where there
 is a legal title in
 possession.

It was said there might be a finding for the crown on an equitable title, *Holland's case*, *Aleyn*, 14, but there it was answered, that was a copyhold, and the crown could not hold of a *mesne* lord. It is true that, in fact, an office was found; but an *amoveat manus* was awarded, not on the merits of the case or the exceptions there taken to the *venire*, but an objection was taken by the court

itself to the commission, that there was no direction for seizing. This was an objection taken, probably on a foresight, that as to the merits of the case they could not succeed. Lord *Hale* was of counsel for the crown in *Holland's* case, and he, in *Sands's* case, *Hard.* 448, shews that the only remedy for the crown to pursue was by bill in equity. He says, the king could not have entered in point of law, and a bill of intrusion did not lie, and the only proper remedy was in equity. It is properly said, that the estates being copyhold might be a reason why the equitable remedy was not pursued. This case is rather an authority to justify the remedy now pursued by the crown, than one to found an objection on; therefore the objection for want of office is groundless, and a bill or information is the only proper remedy.

Objection second. This is not the proper court for the crown to institute a suit in; but it should have been a court of revenue.

This is a strange objection to be made in any case: and as the circumstances are, it is still stranger to be made in this; because, though the crown may insist on being sued in its own proper court, yet it may sue in what court it pleases. *Finch*, 84. It may bring a *quare impedit*, or writ of *escheat* in *B. R.* it may have a *quare impedit* in *B. R.* though there has been a recovery in *C. B.* But it is yet more extraordinary in this case, as the crown might have made the objection, and yet waived it, and filed its information in the same court where the cause was instituted, otherwise all the proceedings in the original cause had been fruitless, and the crown might have then gone into the *Exchequer*: in return for which indulgence this objection is now made. But if any one else could have made the objection, *Burgess* cannot; for he brought the crown here first, and so is estopped.

In Sir *John Warden's* case, before Lord *Talbot*, there

1759.
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

Filing a cross
bill prevents any
objection to the
jurisdiction.

was an objection for want of jurisdiction here, and that the matter was properly triable at law ; but it being disclosed that he had filed a cross bill, the court did not enter into that objection, but said the defendant had *given* a jurisdiction. This brings me to consider the merits of the claim of the crown (a).

The great Question is, Whether the crown has a right to a conveyance of the legal estate from Mrs. *Harding's* trustee, as an equitable escheat by the death of Mrs. *Harding* without heirs, on the part of the father, from whom the estate descended to her.

I shall consider the right of escheat in three lights. 1st. In what situation it stood in respect to conveyances at common law before the invention of uses. 2dly. In what situation it stood in respect to conveyance to uses before the statute of uses was made. 3dly. How it stands since the statute, and now, with regard to trusts. The result and application of the whole will decide the question how far the crown is or is not in equity entitled to a conveyance from a trustee, or those in his place.

In treating these points one might expatiate into a curious field of learning from the writers on allodial and feudal property; but as the doctrine of tenures was never wholly adopted into our constitution, the different periods of our laws cannot be accounted for from a strict notion of feuds; so that it would be perplexing the case to go into the general learning: I shall therefore have only recourse to it occasionally, so far as I find by our own writers that it is now adopted into our constitution. In other respects that law is of no more use than the Roman law; it serves for ornament and illustration.

First. Consider how escheats stood at common law before uses were invented.

(a) *Vide Roupe v. Atkinson, Bunb. 162. 12 Co. 78.*

An escheat was in its nature *feodal*. A feud was the right which the tenant had to enjoy lands, &c., rendering to the lord the duties and services reserved to him by contract. On the other hand, a right remained in the lord (after a grant made) called a *seignory*, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion: a right afterwards called an escheat. And as the grant was more or less extensive, the reversion was more or less remote; for the feuds were sometimes temporary, sometimes hereditary; and a temporary one ended on the grantee's death. Sir *Henry Spelman* takes notice only of hereditary feuds, nor do our own laws. And though it may seem a paradox to modern ears, a feoffment to *A.* and his heirs did not pass a fee simple originally in the sense we now use it, but only an estate to be enjoyed as a *merum beneficium*, without the power of alienation in prejudice of the heir or the lord. And the heirs took it successively as an usufructuary interest; and in default of heirs, the land escheated, or *reverted*, strictly speaking. If there was an heir, and by legal impediment he could not take, the land *escheated*. *Bracton*, fo. 23 a. 46 *Edw.* 3. pl. 4. *Bro. Escheat*. pl. 2.

In short, the *reverter* took place when the grant expired naturally, and the heirs failed in length of time. In case of *escheat* it was cut off by civil law impediment, and was an accidental determination of it. The heir took by purchase, and independent of the ancestor: he could not alien, nor could the lord alien the seignory without the consent of the tenant. Afterwards the right of the lord gradually underwent several variations, which tended to diminish the interest of the heir and the lord, and to increase that of tenant. So is *Spelman*, c. 1.

The first variation was when the power of alienation, with leave of the lord, was introduced; then the heir no

1759.

BURGESS

v.

WHEATE.

The
ATTORNEY-
GENERAL

v.

WHEATE.

An escheat was in its nature feodal; and in default of heirs the land, strictly speaking, reverted.

First variation when the power of alienation with leave was introduced.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

longer took, independent of the ancestor, but what the ancestor pleased to leave him, and by *descent* from him. In *Bracton's* time a doubt arose how the heir took; some thought he was co-enfeoffed with the ancestor, and that he took by purchase from the donor: others held (which opinion prevailed in *Bracton's* time), that he took by descent. This accounts for what is said in 2 *Inst.* 336, that a *formedon in descender* did not lie at common law of an estate tail, because the issue took by descent. But though he lays down the law, he does not give the reason; therefore, if the ancestor aliened, the heir was defeated, and the effect to the lord was only in the chance of the escheat from the change of the tenant: viz. from grantee to alienee.

Alienation without licence, where the word *assigns* in the grant.

The next step in favour of the tenant was to alien without licence; for which purpose a larger grant was necessary, i. e. to him, his heirs, and *assigns*. This gave the standing right of alienations. *Bracton*, l. 2. c. 6. § 1. fol. 17. So the tenant could alien and change the escheat, and the lord was obliged to warrant such alienee. The only restriction on the tenant was, that he could not prejudice the lord by lessening the services reserved. *Bracton*, fol. 23 b.

Alienation without the word *assigns*.

The next privilege to the tenant was, that he might alien where the grant was only to him and his heirs. 2 *Inst.* 66, gives the reason that such tenant was not to be restrained from alienation. It was against the nature and purity of an estate enfeoffed at common law. This was, in effect, only a right of alienation *sans* notice.

Right to charge and encumber.

The next step affected the right of escheat, which was not only to alien, but to charge and incumber the feud; and the lord was to take it subject to such incumbrances. *Wright*, Ten. 117. *Spelm.* 21. 23. *Bract.* 382. § 8. This power of incumbering was more prejudicial to the right of escheat than the power of alienation was. *That*

only changed the chance; but by the incumbrances, more or less, the escheat was in proportion defeated: however, it was still only subject to the acts of the tenant.

The lord's right was still further affected by acts of parliament and judicial determinations, which subjected the land not only to the acts of the tenant, but of the law on the tenant's account. *Stat. Westm. 2.* subjected the moiety of the tenant's land to *elegit*; *Statutes Merchant and Staple* (13 *E.* 1. and 27 *E.* 3.) affected the whole feud for the tenant's debt, even in the hands of the heir.

Bro. Dower, pl. 64. It became also subject to the dower of the wife. The books have omitted the title of original reverter, but the escheat is said to be a compensation to the lord for the loss of services. *Quia homagium et servitium amisit.* So is *F. N. B. tit. Escheat, A.* The right of reverter is quite omitted out of the definition: this before the invention of uses.

Secondly. How escheats stood after the introduction of uses, when the tenant might sever the legal from the beneficial interest. Then the two interests were considered as two distinct sorts of property in different persons. The *cestuy que use* was no longer tenant at law, nor was the land liable to be subject to his incumbrances as dower, execution, &c. *Chudleigh's Case.* But though the land was not liable at law on account of the *cestuy que use*, yet it was still liable on account of the feoffee to uses. *Bro. Feoffment to Uses, pl. 10. Poph.*

This defeated the creditors of *cestuy que use*, and was found inconvenient. Persons having actions against him were defeated; tenancy by dower and by curtesy was gone; and therefore several statutes in favour of creditors were made to restore all the claims against *cestuy que use.* *Bacon, vol. II. of Uses.*

Thus 4 *H.* 7. 19th *H.* 7. c. 15. and others were made to restore the fruits of tenure, to the lord against *cestuy*

1759.

BURGESS

v.

WHEATE.

The
ATTORNEY-
GENERAL

v.

WHEATE.

Acts of parlia-
ment and judicial
determinations.

Dower.

Escheats after
the introduction
of uses.

Statutes made to
restore the fruits
of tenure, but
none to restore
the loss of
escheat.

1759.

BURGESS

v.

WHEATE.

The
ATTORNEY-
GENERAL

v.

WHEATE.

After the statute
of uses.

que use, as wardship, heriot, relief; yet none were made to restore the loss of escheat, which, as *Spelman* observes, was not only the fruits of tenure, but the very tree itself.

Thus it was till the making of the Statute of Uses: that statute united them, but they still continued under the name of trusts, as a divided interest. It was done by limiting the use to the feoffee, who was declared a trustee; there was one use which the statute did execute, and another which it did not: so trusts succeeded uses. *Aliusque et idem nascitur*. And as a use could not be on a use, it took the name of a trust; and as the law would not meddle with a use on a use, equity therefore does.

This brings me to consider the nature of *this* use with respect to an escheat. It has been contended, on the part of the crown, that equity is to be considered as a thing of yesterday; that trusts were not come to any maturity, nor governed by any settled principles, even in 1718; that it was left to the judge in equity, whether to observe the rules of law with respect to uses, or to depart from them; that as to tenancy by curtesy, and tenancy in dower, equity differed from itself. All this is to be considered; and part of it is a melancholy representation of a court of equity.

Equity as old as
Bracton.

As to its pedigree, one may with pleasure observe that equity is as old as *Bracton*, who, fo. 23 b., distinguishes how it would be *secundum equitatem*, and how *secundum rigorem juris*. When once it existed, it must have its rules and principles like other artificial systems: it was not a perfect system. New cases begat new, but not contradictory rules to the old ones. When once a trust became the object of equity, the same governing principles were observed in trusts as before in uses. The analogy as to the outlines of each is apparent. *Bacon*, Law of Uses, 57.

When once a
trust became the
object of equity,
the same govern-
ing principles
were observed in
trusts as before
in uses.

Uses took place from a reasonable cause, to give me

power to dispose of their own; so did trusts from the convenience of families. This was the only motive that made mankind endure uses and trusts. *Bacon*, 80. A conveyance with consideration without notice bars a trust; so did it an use. 2 *Roll. Rep.* But it is not barred in trustees' hands, or in the hands of purchasers, with notice or without consideration.

As to the construction of trusts, the intention of a person creating a trust chiefly governs where not against good policy in its construction. *Hard.* 494. *Bacon*, 79. So it was as to uses. Trusts and uses not only agree in these particulars, but in the different construction of deeds in law and equity. At law the legal operation controls the intent, but in equity the intent controls the legal operation of the deed. It is not sufficient to single out a few instances and exceptions, which no rule is without; and which, besides, in this case, I think, are sufficiently accounted for otherwise.

But it is said, the rule of uses was narrow and inconvenient, and that equity adapts to trusts, not so much the rule of uses, as the consequences of law. That trusts are alienable, will descend *ab intestato*, and be liable to and capable of, the same limitations and successions; are valid and void on the same principles (except the case of dower, which proves the rule); and that in tenancy by curtesy, equity agrees with the system of law.

These are objections all founded on one principle. The analogy must be confined, both in uses and trusts, to those cases where they are considered as distinct from the legal estate; in other cases both uses and trusts fall within the rules of law: this is reasonable, because there is no necessity of departing from them. It is said they are both alienable by like conveyances, &c.; but this does not prove equity in construction of trusts to go by a different rule from the law in construction of uses; for

1759.

BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

The intention of a person creating a trust chiefly governs where not against good policy.

The analogy between uses and trusts must be confined to those cases where they are considered as distinct from the legal estate, in other cases they both fall within the rules of law.

1759.
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 BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

uses went by this rule, and equity would not vary from the law unnecessarily.

*Anderson* says in *Chudleigh's* case (*Bacon*, 78.) (a) there may be a *possessio fratris* of an use. It is no more than saying that the chancellor held consultation with the rules of law, where there was no reason to go against them. The instances prove the agreement between uses and trusts; they agree with the legal system. And the case of tenant by the curtesy is an exception to this rule. Equity does allow a tenant by the curtesy of a trust contrary to the rules of law. *Perkins*, 69. § 349. and 499. § 457.

But this instance of deviation is not to be argued upon to consequences: it seems to have prevailed unaccountably, and against the opinion of the judges themselves. It seems to have taken its rise in Lord *Somers's* time, *Prec. Can.* 65. (b). In *Snell v. Clay*, 2 *Vern.* 324. tenancy *per* curtesy was allowed of a trust, though there was an outstanding term. *Brown v. Gibbs*, *Prec. Can.* 97. In *Banks v. Sutton*, 2 *P. W.* 700, Sir *Joseph Jekyll* makes an observation upon Lord *Somers* avoiding the authority of his own determination; and that he intimated a disapprobation of his own distinction between a use and a trust. *Sweetapple v. Bindon*, 2 *Vern.* 536, was the next. Taken for granted that there was no tenant *per* curtesy, or in dower, of a trust. It is true,

(a) This is a mistake; the passage is as follows: "*Anderson*, C. J., in the argument of the same case, did truly and profoundly contest the vulgar opinion collected from 5 *E.* 4. that there might be *possessio fratris* of a use; for he said that it was no more

but that the chancellor would consult with the rules of law, where the intention of the parties did not especially appear." *Bac. on Uses*, 11. *vide* Mr. *Rome's* note on this point, 10.

(b) *Lady Radnor v. Rothelam*.

Lord Keeper *Wright* held otherwise, and allowed a tenancy *per curtesy* of money to be laid out in lands. I think this precedent does not seem fit to be followed, because the will on which that determination was, admitted a doubt whether the wife was tenant in tail (a). It is mentioned in Pr. Ch. 536. This has correlate to the time of her dying, the brothers and sisters then living. In *Banks v. Sutton*, Sir Joseph Jekyll does not approve any where of *Sweetapple v. Bindon*. And though he held the wife dowable there of an equitable estate, yet he did it on particular reasons; because it was a trust created by the ancestor of the husband, and not the husband himself. This is too precarious reasoning to go upon. The husband found the estate subject to the trust created by the ancestor. Who can say that he intended the wife not to be dowable? Who can say that if he had not found the estate under a trust, he might not have created such a trust?

The next endeavour was to bring the husband down on a par with the wife; but this was denied in *Chaplin v. Chaplin*, 3 P. W. 229. *Attorney-General v. Scott* (b), and in *Godwin v. Winsmore* (c), by Lord Hardwicke, 1742-3. *Casborne v. Scarfe* (d). Husband denied to be tenant *per curtesy* by Sir Joseph Jekyll, but that was reversed. It is, I own, almost a reproach to a court of equity; but shall not equity, therefore, follow the rule of uses? Shall it make another rule deviating from that? I think there ought to be a conformity between trusts and uses; and that this case of tenancy *per curtesy*, which is different, ought to be the only one, and that there the bounds are fixed. *Hard. 494. Attorney-General v.*

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

(a) It being an executory case, to be laid out in land, and settled.

(b) *For.* 138.  
(c) 2 *Atk.* 525.  
(d) 1 *Atk.* 603.

1759.

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 BURGESS
 v.
 WHEATE.
 The
 ATTORNEY-
 GENERAL
 v.
 WHEATE.

Scott. Lord *Coventry's* case. Equity, in determining trusts, has observed the rules of law touching uses, unless there was a reason to the contrary: and the instance of tenant *per curtesy* does not furnish any reason (*a*).

Having considered the right of escheat, and how affected at common law by conveyances to uses, and since upon trusts, I shall now apply the rules and principles collected from the foregoing considerations to the case in question, and see what conclusion arises from thence, and how far the conclusion that I shall draw is warranted by law and reason. And under this head I will consider what arguments have been urged against it.

Suppose Mrs. *Harding*, feoffee at common law of a trust estate, had aliened to Sir *F. Page*, she would have substituted him as an alienee instead of herself for services and escheat. If an escheat had fallen which depended not upon her delinquency, would the lord have been entitled? This is clear. Suppose Mrs. *Harding* attainted of treason or felony, the lord would not have been entitled; but the crown says she had reserved to herself the equitable interest.

It will be necessary then to consider how the crown would be affected by a use, supposing it had been a feoffment to use, made to Sir *F. Page*: would the lord's condition, with respect to an escheat, have been bettered by such a conveyance at common law? I think it would have been worse: he would not have been entitled to an escheat on Mrs. *Harding's* felony.

5 *Ed.* 4. *pl.* 18. *fo.* 7 *b.* is an authority in point against the lord's claim, and questions who should have it. If the lord is at law entitled to escheat on death without

(*a*) Lord *Rosslyn* called it *ville*, 1 *Bro.* C. C. 326. *Vide* the anomalous case, and not also *Forder v. Wade*, 4 *Bro.* the rule, that the wife shall C. C. 525. not have dower. *Dixon v. Sa-*

heirs, or attainder of feoffee to uses, and not on the death, &c. of *cestuy que use*, it strengthens the authority of the case; that if it had been determined otherwise in favour of the lord, it would have given him a double chance for his escheat.

Brooke, pl. 34, agrees the lord shall not have it, nor the heir (by reason of corruption of blood), and that feoffee shall retain it to his own use. And though this is introduced by an *ideo videtur* in a modest manner, yet many of his opinions are so introduced, and have generally been thought of very great authority. Lord *Bacon*, 79, confirms it; for he says the lord shall not have it, because he has a tenant by title: and then differs from *Brooke*, who gives it to the feoffee for his own use, and says the feoffee shall retain it either *in pios usus*, or the will of the feoffer. This seems to arise from an old notion, that a man's estate should be disposed of *in pios usus* (when there was no owner), in like manner as the ordinary used to take an intestate's effects *pro salute animæ*. But *Brooke's* notion is not so strange, even by Lord *Bacon's* own account.

From these authorities it is clear that if Mrs. *Harding* had been *cestuy que use*, and attainted, the lord would not have been entitled to the escheat. How then does the case stand as a trust? It is clear that the crown, at law, is not entitled in case of a use. Then if trusts in equity are analogous to uses at law (and I think they are), neither will the crown be entitled in case of a trust in equity: yet the question will not merely depend on that analogy, but on other arguments and authorities in point.

Sir *George Sands's* case (a) is in point, and that and the 5 Ed. 4. mutually strengthen each other. *Freeman* is rather more accurate than *Hardres*. As Lord *Hale*

1759.
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL,
v.
WHEATE.

Crown at law
not entitled in
case of a use, and
according to the
analogy between
trust in equity
and uses at law,
not entitled to a
trust in equity.

Sands's case.

(a) *Hard.* 402. 2 *Freem.* 129.

1759.

BURGESS

v.

WHEATE.

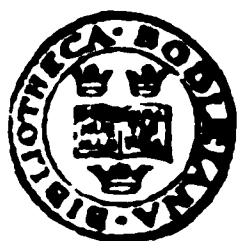
The

ATTORNEY-

GENERAL

v.

WHEATE.



had an analytical head, it will give a clearer idea of the strength of his argument to give an analysis of it. He first states several cases where trusts are forfeited, as for treason by statute; for alienage by prerogative; for a debt to the crown, partly by statute, partly by prerogative, and partly by *cursus scaccarii*, or the course of revenue. Then he distinguishes these cases from an escheat, as founded on a different ground, for want of tenant. Then he goes to a term, and gives reasons why a trust of a term cannot be forfeited. Then comes to his conclusion: if not a chattel, then not forfeitable; if a chattel, *Freeman* never had it to forfeit. I think this good sense as well as good law.

As to the inheritance, the lord is entitled to services while the tenant has the land; when there is no tenant to perform the one, or hold the other, the lord shall have it. Here is a tenant *de jure* to perform them, and so no forfeiture. *Trinity College v. Brown*, 1 Vern. 441, goes on the same principle. The legal tenant was then living, therefore the best beast of *cestuy que trust* not liable.

Some objections were made to *Sands's* case: it was said to be a compassionate case. Much may be said of the charity of Lord *Hale*. He was obliged to mention the relations of the person murdered; but I meet with it only once: so far is he from including any thing to conciliate the passions of mankind as an ingredient to his determination. It was said he was a young judge: he had at that time a great deal of experience, and his abilities were very great. I have seen determinations of the commissioners during the *interregnum*, that do him great honour. The case of Sir *George Sands* was depending a great many years; argued by very great men (*Pasch.* 17 Car. 2. and *Mic.* 20 Car. 2.); which adds weight to the authority. 21 Car. 2. *Hale* and *Trevor* gave their opinions. It is said that only *two* judges gave opinions;

but no one can suppose that there were but two judges during four years in that court. If they differed, *Hale* would never have given his opinion without mentioning it. In his Pleas of the Crown (a), he says it was *unâ voce* resolved, so no doubt but all the judges of the court concurred. It plainly appears it underwent his serious consideration, on second thoughts, by the manner he arranges his argument in his Pleas of the Crown, different from what he did before.

1759.
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

It is said *Hale* goes on wrong principles, for right of escheat is not founded on want of a *tenant*, but of an *heir*; and as an heir was wanting, that the estate should have escheated. But I think escheat not founded on want of *heir*, but of *tenant* to perform the services: *Fitzherbert*, who is most accurate, expressly puts it upon that footing. Some books may use the expression “for want of *heirs*”; but I believe its promiscuous use is owing to this, that before the power of alienation, want of tenant and heir was the same thing, for at the death of the ancestor none but the heir could be tenant.

Right of escheat not founded on want of an heir, but of a tenant to perform the services.

Another objection is, that *Hale* supposes the land will, on the trustee's attainder, or death *sans* heir, escheat to the crown, discharged of the trust; whereas in equity it will be liable to the trust. And then it is said, if the lord takes the estate subject to the trust, he ought to have in return a reciprocal benefit on the death of *cestuy que trust* without heir. I think this position and inference not warranted by any judicial determination. *Pawlett v. Attorney-General*, *Hard.* 465. *Geary v. Bearcroft*, *Cart.* 67, and *Eales v. England*, *Prec. Can.* 200, are cited to support it.

The first I shall consider by and by; the others are mere *dicta* of judges, collateral and foreign to the matter *Geary v. Bearcroft.*

(a) Vol. I. p. 249.

1759.
 ~~~~~  
 BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

in question. In *Carter*, 67, the question was, who should be considered as occupants. As to what *Bridgman* says in *Geary v. Bearcroft*, the whole must be taken together. The other three judges had urged the argument *ab inconvenienti*, and *Bridgman* answers them. They said, a man conveys lands to trustees, and they commit felony, his lands shall be forfeited, though he may have relief in equity. *Bridgman* says, though equity may relieve, yet we must not take prejudice from equity against arguments at law. The equitable point is not the opinion of Lord *Bridgman*, it is only anticipating an equitable objection that might be made against it. Whoever looks into *Geary v. Bearcroft* will, nine out of ten, be of opinion with the three judges against *Bridgman*. Now if he was mistaken in his legal point, it is more likely that he should in equity, being recently brought into that court from being a chamber conveyancer; and on a writ of error in *B. R.* brought on *Bridgman's* opinion, the court affirmed the judgment of the three.

*Eales v. England.*

As to Pr. Chan. 200, *Eales v. England*, the same expression is not in *Vernon*, and this was a very extraordinary medium of proof, of which no precedent had ever been before him; it is proving *incertum per æque incertum*, if not *multo incertius*. Both the sayings of *Bridgman* aforesaid, and of *Trevor* here, have not the least relation to the matter in question. In this last case the question arose upon the death of a trustee for £300, in the life of the testator, whether the £300 legacy was lapsed. Lord *Trevor* might have used many more similar and certain instances. *Pitt v. Pelham* (a) must have occurred to him, where it was held, that the death of a trustee could make no alteration in respect of the beneficial interest: instances where trustees for payment of

(a) 1 Ch. Ca. 177. 1 Ch. Rep. 283.

legacies have died in the testator's life, the estate has descended to their heirs, and been considered as a trust;—and many much more similar;—none more difficult to prove; and had he been called upon to prove his *medium*, I believe he could not have done it. On the contrary, I believe, on the death of feoffee, to uses *sans* heir, the books say the lord shall take the fruits.

This accidental accruer of a benefit comes in lieu of another benefit, and *cestuy que trust* seems no more relievable in this case than on a sale without notice by the trustee. I think the contrary notion has been introduced, by considering an escheat on the foot of a forfeiture. But they differ materially, not only in the manner of the crown's taking, but in respect of the consequences. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. The crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat); but in general, I apprehend an escheat is taken free from any equitable claim. If a forfeiture is re-granted by the king, the grantee is a tenant *in capite*, and all *mesne* tenure is extinct. If land escheated be re-granted, he shall hold in honour. Therefore the position, that the lord takes the escheat subject to the trust, seems not warranted: though it is not necessary, I think, to give an opinion upon it (a).

But, supposing the position alleged to be true; why ought the lord to have a reciprocal equity on the death of *cestuy que trust* without heirs? What was cited out of Lord Nottingham was the opinion of counsel, who

(a) Since the late statute, 39, 40 Geo. 3. c. 88, it is not probable that this question will arise, in the case of the king, either upon the felony or treason of a trustee. The case of a subject claiming as lord by escheat, has not been directly determined. *Sanders on Uses*, 280, 281.

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting.

The opinion that the lord takes the escheat, subject to the trust, seems not warranted, though no opinion given upon it.

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

throughout confound forfeitures and escheats, and speak of attainders in general, without distinguishing whether of felony, which would create an escheat, or of treason, which would create a forfeiture. It has been said the king may be subject when in the *post* as when mortgage is attainted, and shall have equity of redemption as when mortgagor is attainted; for the trust charges the land when *non egreditur personâ*. Sir *Salathiel Lovel's* case —, *Salk.* 85. When there was a saving of blood, it was contended, forfeiture did not take place; but held that in treason it would, though in cases of escheat it would not. It is not every argument in law or in logic that holds *converso*. It fails here, that the lord has as good a right as the other had against the lord. On a conveyance of land at common law, if tenant contracted a debt, and the land was extended, the lord took it subject to the debt: but did that give the lord any other right upon that account? The lord in one case may lose; therefore in his turn, it is said, he ought to gain. But there should be a reciprocal right to have a reciprocal equity, and this would be allowing a reciprocal equity without a reciprocal right. Therefore I think the inference drawn is not warranted by the cases.

Several cases have been mentioned to encounter *Sands's* case. *Attorney-General v. Holland* (in *Aleyn, &c.*) was cited to shew the king shall have the benefit of a trust as well as of a legal estate. That was not determined upon the merits; but *Aleyn*, 14, and also *Stiles*, suppose trust for an alien did go to the crown; that the crown takes by prerogative: at common law, if an alien purchased and took a conveyance, he took it for the benefit of the crown by prerogative. After uses were invented it was necessary to settle, where the use should go purchased for the benefit of an alien. Therefore the statutes 3 R. 2. c. 5, and 7 R. 2. were made to enforce the common law prerogative, which else had been evaded by

the introduction of uses. The ground of it was originally a common law right; and, if a trust had been created, the king would have been entitled to the trust, the same as to the land. But does it hold, therefore, that a trustee takes for the crown on the death of *cestuy que trust*? The difference between taking by prerogative and escheat is material, and Lord *Hale* makes the distinction.

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

As to *Pawlett v. Attorney-Generel*; it never came on upon the merits. It was a demurrer only to a bill brought by mortgagor. The mortgage was made to *Edmund Ludlow's* father, and descended from him to *Edmund* the secretary; and, in consequence of his attainder, was seised to the use of the crown. The executors of the father were entitled to the mortgage-money, and they put in suit a recognizance entered into as a collateral security for paying the money. The crown seized the lands, and mortgagor filed a bill, and made the *Attorney-General* and *Ludlow* parties. The *Attorney-General* demurred; said the remedy taken was improper; it should have been by petition of *grace and favour*, as they call it, but meant of *right*. *Hale* said, equity of redemption lay against the crown, but as to the remedy, or manner of suing it, that was a matter of high nature; but he held the executor, and not the heir, entitled to the mortgage-money. These are the circumstances of the case. What says Lord *Hale* in *Pawlett's* case? That though, by attainder of treason, the estate was forfeited, yet it was liable to redemption in the hands of the crown. What does he hold in *Sands's* case? that a trust estate did not escheat on the attainder of *cestuy que trust* for felony. The consequence is, that if the trustee is attainted for felony, or die *sans* heir, the estate would escheat to the crown.

*Pawlett v. At-  
torney-General.*

There is a distinction between the cases; a double difference between this and *Sands's* case. One is escheat

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

A trust is collateral to the land, and created by contract of the party, and therefore one who comes in in the *post* shall not be liable to it: but an equity of redemption is inherent in the land, and binds all persons in the *post* or otherwise.

Trust of the legal estate can only be co-extensive with the legal estate.

for felony, the other forfeiture for treason: the one a trust only, the other an equity of redemption. The distinction between an escheat and a forfeiture cannot be disputed. The other distinction between a mere trust and an equity of redemption is rationally taken by *Hale* in *Pawlett's* case, 467. I conceive a mortgage is not a mere trust, but a title in equity: 469 he says, a trust is collateral to the land, and created by contract of the party; and therefore one who comes in *en le post*, shall not be liable to it: but the power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise. In this Lord *Hale* is not singular; Lord *Nottingham* (MS) says, an equity of redemption charges the land, not a trust; therefore, though for this particular purpose (as to allowing husband to be tenant *per curtesy*), there is no difference between a trust and an equity of redemption, yet it does not follow that they run *quatuor pedibus* (a).

It has been hinted that Lord *Nottingham* seemed to think it deserved further consideration. But I think he rather approves the case. His words are (MS.), "In *Sir George Sands's* case, (whose son being *cestuy que trust* of a term, and attainted for felony,) it was resolved, that the term was not forfeited, because the inheritance was not forfeited. *Unde sequitur*, where the inheritance is forfeited, term is forfeited. I therefore think *Sir George Sands's* case is unimpeached."

But then it is endeavoured to bring the lord within the trusts of the deed of 1718. There is no trust expressed or declared for him. Is there any implied, or

(a) *Vide* Lord *Eldon's* observations in *Tucker v. Thurston*, 17 *Ves.* 133. The difference was relied upon and urged by some of the counsel for the defendants in the late case of Lord *Cholmondeley v. Lord Clinton*: it was not however noticed in the judgment.



resulting to him? The trust of the legal estate can only be co-extensive with the legal estate: so that I think Mrs. *Harding* had not power to create a trust to give the lord a right after her heirs. Her interest ends where his begins. She could not create a trust, that could not be executed by a legal limitation. If there had been a limitation to the lord in default of her heirs, it would have been void, and the lord would have taken by his own title, which is paramount to that, and not by her title.

The intent is to prevail, it is said: could Mrs. *Harding* be supposed to have the lord in view? The legal estate may be extended to answer the purposes of the trust declared. There can be no trust where there is not a legal estate created co-extensive with it; and a trust cannot be executed where no intent appears to create it, save by operation of law; and a trust cannot result by operation of law, but for those for whom the trust might have been declared by the party creating the trust. The deed expresses no trust for the lord, therefore the court cannot execute one.

But it is said, the limitation to trustees is in trust for her and her heirs, and subject to her appointment: she making none, the lord is to be considered as heir or appointee: that, before the power of alienation, the lord had a strict reversion; but since, it is become a kind of heirship or assignment.

This is inverting the law itself; for he claims in the *post*, not in the *per*: it makes the lord hold of the tenant, not the tenant of the lord. Can the power of alienation give the lord a greater power than he had before? Before the power of alienation, tenant or heir took by purchase, as a mere usufructuary, and the lord took what the ancestor left. Before, as well as after the power, the lord and tenant had the whole interest, and, as the tenant's power over the feud increased, the lord's diminished.

I admit the lord in some places is called *quasi hæres*,

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

A trust cannot be executed where no intent appears to create it, except by operation of law; and cannot result by operation of law, but for those for whom it might have been declared by the party creating it.

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

Though the lord is sometimes called *quasi hæres*, it is always to his prejudice, and never to his benefit.

So far from the lord taking any benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law, and the assignee by statute.

but it is always to his prejudice where he is so said to take, and never to his benefit. *Bract. 23 a. Item cum revertitur terra non pro defectu hæredis, sed propter impedimentum perpetuum, habebitur loco hæredis ad warrantizandum, &c.*, which shews that, before the power of alienation, the tenant could not demise, but the lord was obliged to warrant to the lessee as much as the heir. *Bro. Esch. 33.* is a very obscure case, and not to be found in the year book. Where the crown made a grant to *A.* for life, or to the heirs of his body, the king, on the death of tenant for life, or in tail, shall be in without office, whether he enters or not, as being heir of the person who died seised.

So far is the lord from being entitled to a benefit as heir or assignee, that he is, on the contrary, excluded from privileges that the heir or assignee is entitled to. At common law, only, feoffor or his heirs could enter for breach of condition; grantee or assignee could not, therefore the statute of *Henry 8*, was made to cure that defect, and give the grantee a right of entry, *Co. Litt. 215 b*; yet the lord could not claim that benefit under the statute. So that, so far from the lord taking benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law, and the assignee by statute. Yet it is said, the lord may distrain for rent reserved to *A.* and his heirs (*a*). *Co. Litt. sect. 348*, as in the place of heir, and so has privileges equal with the heir. I cannot admit this right of distraining is a privilege; for his right of distraining is not as heir, but as incident to his reversion; and the same book says, the lord cannot enter, because he is not heir. And this answers another observation, that the lord may take the benefit of a term limited to the owner and his heirs; but the answer is, he does not take it *as heir*; but

(*a*) *Vide* the argument in *Fairclain v. Shamtitle*, 3 Burr. 1299.

where he takes the inheritance as escheated, he takes the term as attendant upon and following the fate of the inheritance ; according to *Sands's* case, *Pawlett's* case, and Lord *Jeffries's* determination.

But if the lord is not within the reach of the deed of 1718, yet it is said, that this is but a mode of conveyance for a particular purpose, to give a feme covert a power to dispose of her estate if she pleased ; and as it has never answered that purpose, it is to be considered as if it had never existed ; and if so, then the estate would have escheated on her death *sans* heir.

This is contrary to what the heirs on the part of the mother insisted on. The maternal heir is for having another deed, *i. e.* a supposed re-conveyance from the trustee to Mrs. *Harding*. The court can do neither. But it is begging the question to say that the deed of 1718 shall be laid out of the case. Voidable deeds shall not be laid out of the case, but shall bind the escheat, 2 *Roll. R.* 403. 7 *Rep.* 7 *b.* An infant's deed shall bind against the lord ; and that in *Rolle* was a lease by the husband of the wife's land, without her joining. She dies *sans* heir. Question, whether it should bind the lord's escheat ; and it was held that it did. So, for the purpose of binding the lord in escheat, deeds have been held good against him, that would have been void in other respects. The deed cannot be laid out of the case. The effect of it is such, as legally to exclude the lord while there is a tenant.

If the escheat is legally gone, where is the equity to revive or restore it ? Is it such a right as should induce the court to go out of its way in its support ? Escheats are become notional and positive, and the reason a good deal ceased since the tenant's power of alienation, and the heir's becoming dependent on the ancestor. Why should not a rent escheat as well as a trust ? The first lies in

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

For the purpose of binding the lord in escheat, deeds have been held good against him that would have been void in other respects.

1759.

BURGESS

v.

WHBATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

tenure as well as the last. At least, why should not the lord have the rent in equity? Every body knows the land shall be discharged of the rent, rather than the lord shall have it. The equity is as good in one case as in the other.

I admit most of our law, as to its foundation, is positive. The instances put from the feudal law deserve no favour, in preferring the uncle to the father, as heir to the son, and preferring the lord by escheat, rather than one of the half blood. If the uncle in the one case, and the lord in the other, has a legal right, equity will not take it away. But, when any of these rights are gone at law, I think a court of equity cannot interpose to restore them.

Arguments are used *ab inconvenienti*. They say the consequences will be mischievous; as, if one is convicted of felony, whose estate is in trustees, the *cestuy que trust* forfeits for felony, and is restored by pardon. Shall the trustee hold both against the crown and the *cestuy que trust*? Whether he can keep it against the crown, is the case in question. But the detaining it against the crown, where the *cestuy que trust* has no relation, is different from detaining it against *cestuy que trust* himself. If trustee should set up such a title, it is a case which never yet happened; if it did, I should think courts of equity would go as far as they could; and I think trustee estopped against setting up that claim (a).

Case of mortgagor dying without heir.

Then it was said, suppose mortgagor die without heir, shall the mortgagee hold the estate absolutely? And if he demands his money too of the personal representatives, shall he have both land and money? If the mortgagor dies without heir or creditor, I see no inconvenience if the mortgagee held it absolutely (b). In the case of forfeiture for treason, it is certain that the crown may re—

(a) *Vide post.* 236, and p. 254.

(b) *Vide post.* 256, and notes at the end of the case.

deem, as in Sir *Salathiel Lovel's* case. And as to the supposition that the mortgagee may demand his money too, that must \*be where the mortgagor dies without heir; therefore the demand must be against the personal representatives, by virtue of some bond or covenant for payment of the money. And if the mortgagee took his remedy against the personal representatives, I think the court would compel the mortgagee to re-convey, not to the lord by escheat, but to the personal representative; and, if necessary, would consider the estate re-conveyed, as coming in lieu of the personalty, and as assets to answer even simple contract creditors. Under these circumstances where is the great inconvenience?

representatives for the money too, *M. R.* of opinion, that the court would compel him to re-convey, not to the lord by escheat, but to the personal representative.

Another case is put of a purchase, and the money paid by the purchaser, who dies without heir before any conveyance. Here, it is said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate which he has been paid for, and keep the money too. I think the lord could not pray a conveyance; to say he could, is begging the question. And as to the vendor's keeping both the estate and the money, it is analogous to what equity does in another case; as where conveyance is made prematurely before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser, which would leave things *in statu quo* (a).

But now what are the inconveniences on the other side? This interposition prayed would change the law, and

(a) *Vide* Mr. *Sugden's* observations upon this case, put by the Master of the Rolls, Vend. and Purch. 224, 225. also 2 Sim. and Stu. 502.

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.  
[ \*211 ]

If mortgagor were to die without heirs, and mortgagee in possession were to come against the personal

Case of a purchase, and the money paid by the purchaser, who dies without heir before any conveyance: *M. R.* of opinion, that the lord could not pray a conveyance.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

[ \* 212 ]

that, too, in the case of a legal tenant. It would give the lord a double chance. For this determination would be a precedent for an equitable escheat on the death of *\*cestuy que trust*, and there are other cases to warrant escheat on the death of trustees, unless the court should interpose: and that lets in another objection, that it is bringing both into a court of equity. If the inconveniences were greater than they are, and not overbalanced by those on the other side, yet I think arguments *ab inconvenienti* ought not to prevail but where the case is doubtful. In *Pawlett's* case inconveniences appeared to Lord *Hale*, that the tenure would be destroyed by the estates accruing to the crown by the forfeiture: but did he object to the right of redemption on that account? or that any recompense should be made to the crown in lieu of it? In the present case I do not think the balance so near. The lord takes escheat subject to particular incumbrances, and even to the devise of the tenant. If she had contracted debts to the value, and the estate had been extended, or if tenant devised it, the lord could not complain. Here she put an end to her own tenancy to prevent the estate from escheating by her death without heir.

No opinion given  
on the right of  
the trustee.

I am for following the analogy of the legal escheat as well as of the legal descent, and for pursuing legal principles; because the law gives the escheat only for want of a tenant, equity must do the same. If it did not, it would be making law, instead of administering equity. I give no opinion of the right of the trustee. I give my opinion that neither the maternal heir nor the crown has any right. If the trustee came into a court of equity, I might be of opinion that he had no right (a); but have no occasion at present to enter into the merits of the defendant's defence.

(a) *Vide Williams v. Lord Lonsdale*, 3 *Ves.* 572, and note at the end of this case.

In bills of interpleader it is necessary to decide the right, because the money is brought into court. So, \*where trustee disclaims, or desires to be discharged, and it is a contest between volunteers for trust-money, or trust-estate, there the court frequently determines the right of the defendant to see to whom the estate is to be conveyed, where the plaintiff is not entitled. But, even in that case, they sometimes will not do it, but order a conveyance to a Six Clerk not to prejudice the cause.

If plaintiff has no right, defendant may hold till a better right appears; the possibility of that happening, shews the impropriety of entering into consideration of the right of the trustee. I am clearly of opinion that the invidiousness imputed to his defence, ought not to give the plaintiff a better right.

Many other cases might be taken notice of. As the mortmain acts; where a use was given to a corporation aggregate, the statute 15 R. 2. gave the lord a right to enter. So where given to a body corporate it is void, but it does not say for whose benefit it is void. The lord could not claim it, nor the party against his own act. So purchases by papists. So a lease by one joint-tenant to A. reserving rent, lessor dies, the surviving joint-tenant cannot have the rent, it enures to the benefit of the lessee. So the case of tenants before the late act (a), where rent could not be recovered, &c. So *Cowper v. Cowper*, 2 P. Wms. 652. In all these cases it is to the last degree invidious, yet equity never interposed in any of them, though they lay under the highest temptation to do it, before the late act, for the man held the land, and, but for an accident, must have paid the rent. There cannot be a stronger instance than *Cowper v. Cowper*, before Sir Joseph Jekyll. That was a demand set up by Mr. S. Cowper in a court of equity, and as unfa-

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.  
[ \*213 ]

Where plaintiff has no right, defendant may hold till a better right appears.

(a) 11 Geo. 2. c. 19. Vide *Jenner v. Morgan*, 1 P. W. 392.

1759.

**BURGESS**  
v.  
**WHEATE.**  
The  
**ATTORNEY-  
GENERAL**  
v.  
**WHEATE.**  
[ \*214 ]

vourable a one as could come before a court. Sir *Joseph Jekyll* says, “ I own I cannot forbear declaring, that, if \* I were to consider the matter, not sitting in a judicial capacity, but taking in all considerations, honour, gratitude, a man’s private conscience, &c., I must think that this claim ought never to have been set up.” But did this invidiousness prevent the success of the claim? So far from it, that this declaration of his is only a prelude to the determination he made. I shall conclude with what he concludes with there, concerning the province of a court of equity, and the boundaries of its jurisdiction. “ Upon the whole matter, my opinion is, this title *should not have been set up*. But now it is so, it appears a plain and a subsisting one; the law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum, qui leges, juraque servat*. And as it is said in *Rooke’s* case, 5 Rep. 99 b, that discretion is a science not to act arbitrarily according to men’s wills and private affections; so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this, nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.” This description is full and judicious, and what ought to be imprinted on the mind of every judge.



These are my sentiments, my lord, and, as such, they are submitted to your lordship's judgment.

\**Lord Mansfield*, C. J.

On the ground of the case on the certificate, the whole turns on the effect and operation of the deed of 1718 in a court of equity.

The first question that arose was between the heir and the trustee only. Sir *F. Page* entered 1738, and *July*, 1739, *Burgess*, as heir of *Elisabeth Harding*, brought his original bill against the trustee. On the 14th of *July*, 1741, the cause came on to be heard. On the pleadings being opened, and the nature of the question appearing, the *Lord Chancellor* himself objected to the *Attorney-General's* not being a party in respect of the king's right by escheat. Both parties were extremely desirous that there should be no question upon the escheat, and the *Attorney-General* did not insist upon it; but the *Chancellor* asking him if he waived any right the crown might have, and would consent it might be so entered, the cause stood over. The *Attorney-General* was then made a party, and the information was filed on behalf of the crown (a).

There are three competitors before the court. Two claiming as plaintiffs, and praying relief; the third a defendant, objecting to any relief. The heir on the part of the mother claims by an alteration having been made in the deed of 1718, in this court as well as at law. And, had the trustee conveyed to Mrs. *Harding* after the husband's death (the only purposes for which the trust was

(a) *Lord Rosslyn* observes, the title of the crown appearing upon the record, even though it is not insisted upon at the hearing. in *Barclay v. Russell*, 3 *Ves.* 436, that a court of law cannot give judgment, nor can a court of equity decree against

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

[ \*215 ]

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

[ \*216 ]

created being then ended), the heir, on the part of the mother, had undoubtedly been entitled.

The king claims, as the deed of 1718 is a conveyance \*only of legal form, and has in this court made no alteration in the beneficial estate; but has left it to go in this court as it would have gone before at law, as if the deed of 1718 had never been made.

The trustee objects to the heir's claim, because he says the deed of 1718 has made no alteration as to the beneficial estate of which Mrs. *Harding* died seised *ex parte paternâ*, and opposes the king's right, because it has changed the right of escheat, both at law and in equity; and upon a general objection, that the plaintiffs must recover upon their own strength to entitle them to relief: for it is not enough for the plaintiffs to shew that the defendant has no right, but that they have a better, upon equitable grounds; and, in the case of a trust, must shew a better right within the terms of the creation of the trusts.

It seems agreed in this case, that the heir *ex parte maternâ* cannot inherit the trust, because the trust ensues the nature of the land; which, before the deed of 1718, could not have descended in the maternal line: and I am at present of that opinion. The doubtful question is, whether the king is entitled to this trust? And that will depend upon arguments drawn from the nature and effect of a conveyance in trust, and from the nature of the right of escheat.

I will follow the method which was used at the bar under the four following heads. *First*, the nature of trusts of land, and the rules which govern them. *Secondly*, the nature of that right, by which the king claims in the present case. *Thirdly*, whether, if the trustee had died *sans* heir, the king must not, in that case, have taken the land in a court of equity, subject to the trust. *Fourthly*, I shall apply the result of this inquiry as be-

tween the king and the trustee, to the particular point immediately in judgment.

\**First*, As to the nature of trusts of land, and the rules by which they are governed. By an inquiry into the nature of a use or trust of land, no more is or can be meant, than, as to uses, to find out historically on what principles courts of equity, before 27 *H. 8.*, received jurisdiction, in modifying or giving relief in rights or interests in lands, which could not be come at but by suing a *subpœna*; as to trusts, what the court does in modifying, directing, and giving relief in the said rights and interests in cases where there is no remedy but by bill in a court of equity.

Whoever shews that the relief given now is more extensive, that it is considered by different or opposite rules, that the right is considered in different or opposite lights, will shew the difference and contrast between uses and trusts.

The opposition is not from any material difference in the essence of the things themselves. An use and a trust may essentially be looked upon as two names for the same thing; but the opposition consists in the difference of the practice of the court of *Chancery*. If uses before the statute of *H. 8.* were considered as a pernancy of the profits, as a personal confidence, as a *chose* in action, and now trusts are considered as real estates, as the real ownership of the land; so far they may be said to differ from the old uses; though the change may be not so much in the nature of the thing, as in the system of law made use of upon it.

Having defined the terms, I will first shew, negatively, what is not the law and nature of trusts. I apprehend the old law of uses does not conclude trusts now; where the practice is founded on the same reason and grounds, the practice is now followed. Its positive authority does

its authority in the case of trusts.

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.  
[ \*217 ]

The opposition between uses and trusts does not consist in any material difference in the essence of the things themselves, but in the difference of the practice of the court of *Chancery*.

That part of the old law of uses which did not allow any relief to be given for or against estates in the *post*, does not now bind by

1759.

BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

Where a court of justice takes cognizance, and compels the execution of trusts in substantial ownership, the trust becomes the mere form of a legal conveyance.

not bind where its reason is defective ; more especially that part of the old law of uses which did not allow any relief to be given for or against estates in the *past* does not now bind by its authority in the case of trusts.

The law of uses before the statute is the doctrine that gave rise to trusts after the statute, the struggle afterwards ; all that is present to our view is a series of things that give us, perhaps, a history of facts, and why they were ; but gives us no plan consistently deduced from any system of natural justice or public policy.

Trusts, from the nature of the thing, may be left to the honour and faith of the trustee. In that case they are not the objects of law, otherwise than as they may be fraudulent and void in respect of third persons ; or a court of justice may take cognizance, and compel the execution of them. In that case trusts retain only the name of trusts : in substantial ownership the disposition in trust becomes the mere form of a legal conveyance.

Trusts in *England*, under the name of uses, began, as they did in *Rome*, under no other security than the trustee's faith. They were founded in fraud to avoid the statute of mortmain. Lord *Bacon* thinks them little known before *Richard* the 2d's time.

Though the first hint of uses was probably to avoid the mortmain act, yet they were innocently applied soon after to other purposes. A benefit to issue out of lands could only be made by the interposition of uses : wills of land could only be made that way.

Natural justice said, he who breaks his trust does wrong ; so *cestuy que use* was driven into *Chancery* by breach of faith. There were not six cases of uses before *Edward* the 4th's time. The court first interposed on very narrow grounds : so far as a personal confidence was placed in the trustee, they decreed him to perform the trust ; but the heir of trustee or grantee was not liable.

*Keilw.* 49. *Subpœna* lay only against trustee himself till *Hen.* 6., and then *Fortescue* changed it. 22 *Ed.* 4. fol. 6. pl. 18. This was against the heir, but upon a reason which equally holds with respect to the grantee. The *Chancellor* afterwards extended his remedy, unless the alienee purchased for valuable consideration without notice.

While heir or alienee were not liable, the plan, though narrow, was consistent, and was adhered to through all its consequences; but when these two exceptions were made, it was absurd not to give remedy in all other cases within the same reason. Till *Henry* the 8th's time the widow of trustee held her dower, the husband his curtesy, the lord his escheat, and the king his forfeiture, free from the trust; yet their title was not in reason better than the heir's.

In the time of *Richard* 3d, the king, though trusted as a private man, and coming in the place of trustee who was a villain, alien, or traitor, might keep the estate, or give it away, free from the use. Corporations, though expressly trusted, might keep the estate themselves. Thus stood the jurisdiction of *Chancery* with respect to those against whom it was to give relief.

The jurisdiction was as narrow in respect of the persons to whom relief was to be given. The widow, the husband, the creditor by real lien, the lord, the king, could not sue as standing in the place of *cestuy que use*, or being owner of the estate. Where the confidence was to an intent that could not be executed, it never was settled what should be done with the estate. 5 *Ed.* 4. fo. 7. pl. 18. Because the lord could not have it, as he claimed in the *post, query*, who shall have it? *Bro.* says the heir shall not have it, because of the corruption of blood, and *ideo videtur*, &c. *Bacon* says it should go to

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

In the case of uses before the statute, where the confidence was to an intent that could not be executed, it never was settled what should be done with the estate.

1759.  
 ~~~~~  
 BURGESS
 v.
 WHEATE.
 The
 ATTORNEY-
 GENERAL
 v.
 WHEATE.

the will, or *in pios usus*. If a man appointed an use by his will to one for life, remainder in fee to another, and the *cestuy que use* for life refused, because there was no confidence for the heir, nor for him in reversion; the appointee or feoffee should hold the estate for life, some way or other, for the benefit of the feoffee, and not of the feoffor. 37 H. 6. cited there.

Great inconveniences arose from so narrow and contracted a system: that the *cestuy que use* should enjoy and dispose, and yet not be owner to all purposes; and that the feoffee, who really had nothing, should be deemed owner so as to convey estates out of his seisin by legal conveyance not subject to the trust. *Bacon's Use of the Law* sums it up very emphatically in these words: "By this course of putting lands into use there were many inconveniences; as this use, which grew first from a reasonable cause, namely, to give men power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights: as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his lordship, relief, heriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease: for these rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee of the trust" (a).

Many acts were made to cure these mischiefs in part; and all looking on *cestuy que use* as the true owner in

(a) Page 153. In the report in *Blackstone* the passage is quoted very incorrectly, apparently from memory. It is the same passage which the learned commentator cites, 2 *Comm.* 331.

the cases provided for in respect to demanders, creditors, lords, and *cestuy que uses*, alienees of all kinds. On the same plan at last the 27 H. 8. was made, that the use should be the universal legal ownership. Lord *Bacon*, says it is plain the statute meant to remedy the matter, because use, trust, confidence, are used as descriptions of the beneficial interest throughout the act. 33 H. 8. ascertains the forfeiture for treason, not with a view to trusts unexecuted, for 27 H. 7. has the word *trust* as synonymous to *use*, this statute only mentions *use*. Lord *Hale* says, on a case just after the statute, that *the use, &c.* By 33 H. 8. *cestuy que use* forfeited for his own treason, and not for the treason of his trustee. In *Bro. 340*, held on a sale, a use could not be declared to the vendor; but from the nature of the transaction, and the price paid, the use must be to the vendee. And in *Dyer, 155*, on a bargain and sale enrolled, no estate could be declared out of the use of the bargainee.

From hence it grew to be a maxim, that a use could not be on a use. When this was established there was no idea that a second use could have any existence or effect; but if it was a use, trust, or confidence, it was executed; if it could not be executed, it was nothing.

Terms for years were not within the statute 27 H. 8. Trusts might be declared of them to be executed in *Chancery*. By the advice of the judges in *Dyer, 369*, such trusts were held not assignable, were as a right of action, and nothing at law, but were merely to be executed in *Chancery*. This notion arose from the practice of limited terms in trust, and it is strange, after a trust was considered in *Chancery* as an interest, the judges did not say it should be executed as a use, a confidence within the statute, or distinguish between trust executed and executory; but because the whole trust could not be

1750
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.

1759.

BURGESS
v.
WHEATH.
The
ATTORNEY-
GENERAL
v.
WHEATH.

limited different ways, the real use should not be raised out of the nominal one.

After this was forced into *Chancery*, trusts long fluctuated in great uncertainty. 4 *Inst.* 85. In 43 *Elis.* a trust was decreed in *Chancery* to be a mere right of action, and therefore not assignable. In *James* the 1st's time (*Abington's* case) (a), all the judges held, the trust of a freehold estate was not forfeitable for treason; they must therefore consider it as a mere *chose in action*. 2 *Roll. Abr. C.* pl. 1. f. 780. Trustee of a term for years is attainted of treason; the term is forfeit to the king free of the trust, because the king comes in the *post*, and cannot be seized of an use.

11 *Jac.* 1. *Cro. Jac.* 513 (b), trust of a term held forfeited; trust of a freehold not; and they argued that the king should not have the trust too, as it was forfeitable by the trustee. The argument which gives the forfeiture in treason, holds not in the case of a trust. If it were the same as a use, the statute would not have extended to it.

After the restoration, *Hale*, on the subject of trusts, followed to a degree the errors of the time, and applied to trusts what had made uses intolerable. 1 *Ch. Ca.* 12 circ. 14 *Car.* 2., he held, the trust of a fee descended to the heir should not be liable in *Chancery* to specialty debts of the ancestor, so that it descended free from debts. In 15 *Car.* 2. *Colt v. Colt*, 1 *Ch. Rep.* 254, it was held, the widow should not have dower of a trust in this court. 12 *Car.* 2. *Freem.* 139. *Ch. Ca.* 128. *Pratt v. Cole*, held, that the trust of a fee descended should not be liable to judgment creditors. So the heir took it free from all incumbrances.

(a) *Vide* Lord *Hale's* observations on *Abington's* case, 1 *P. C.* 249.
(b) *Hob.* 214.

This to 22 *Car.* 2. may shew how they reasoned in *Westminster Hall* upon trusts, *Pitt v. Pelham* (a). The testator appointed his land to be sold, and the purchase-money to be divided among four persons, one of whom was his heir at law; but he did not devise his lands to anybody; he did not give anybody power to sell; he placed no express confidence in the heir to sell. The *Master of the Rolls* made a case to be heard before *Lord Keeper*. Diligent search was made for precedents; then a trial was ordered in *C. B.* to see whether the executrix of the testator, or her executor, she being dead, had a legal power to sell by implication. Upon a special verdict being found, the judges negatived any such power. The case came back into equity, and, after all, the *Lord Keeper* held the heir not liable as a trustee to perform the devise, or make any conveyance to a purchaser, and so dismissed the bill.

In my opinion, trusts were not on a true foundation till *Lord Nottingham* held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of *H. 8.* meant to avoid.

The *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates), as the ownership or legal estate, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. The statute of frauds speaks of devises

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

The *forum*, where they are adjudged, the only difference between trusts and legal estates.

(a) 1 Ch. Ca. 177. 1 Ch. Rep. 283.

1759.

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 BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

only of lands and tenements: yet the trust being considered in this court as the land and tenement, can only be devised, as lands and tenements may, pursuant to that statute. How different is it from an use! That is neither land nor tenement. This act gives sanction to trusts divided from the estate, and guards them from the danger of parol proof.

It would be endless and unnecessary to enumerate the various consequences through which the principle has been pursued, that a trust in *Chancery* is the estate at law, since 22 *Car.* 2, among others, it has been declared, that the husband should be tenant *per* courtesy of a trust; the case of dower is the only exception, and not on law or reason, but because wrong determinations had misled in too many instances to be now set right. *Radnor v. Vendebendy* was determined on that principle only in the *House of Lords*. In *Banks v. Sutton*, the argument of Sir Joseph Jekyll proves there ought to have been dower of a trust, and he stretches there to make a distinction. In *Attorney-General v. Scott*, that was not followed, because it would shake so many settlements. In *Casborn v. Scarfe* (a), Lord Hardwicke says, "How it came to be so settled at first is a different consideration, and difficult to find out a sound reason for: but now we must adhere to it as established." The dissatisfaction has not been from allowing the tenancy *per* courtesy, but from denying the tenancy in dower of a trust. And if an alteration was to be introduced, the best way to set it right would be to allow the wife dower of the trust estate (b).

Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by imitation. Every thing I have heard, read, or thought of since, has confirmed that principle in my mind.

In *Banks v. Sutton*, Sir Joseph Jekyll boggled at

(a) 1 *Atk.* 603.

(b) *Ante*, p. 198.

imitating the legal right (which depends upon an actual seisin during the coverture), and of applying it to an equity of redemption. In the eye of this court Lord *Hardwicke* thought the equity of redemption is the fee simple of the land (a). It will descend, may be granted, devised, entailed, and that equitable entail be barred by a common recovery (b). This proves it is considered as such an estate, whereof, in consideration of this court, there may be a seisin; for, without such a seisin, a devise could not be good of a trust. He who has the equity of redemption is considered as the owner of the land. He says it is a settled right in equity which a man cannot come at but by *subpœna* (c); that the husband and wife, being in perception of the rents and profits during the coverture, were seised of a freehold by imitation of the law. The allowing tenancy *per curtesy* of a trust is founded on the maxim that equity follows the law, which is a safe as well as a fixed principle; for it makes

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

The equity of redemption in this court is the fee simple of the land; will descend, may be granted, devised, and entailed, and barred by a common recovery: which proves that, in consideration of this court, it is such an estate as there may be a seisin of.

(a) The words of Lord *Hardwicke*, which are here referred to, are in *Casborne v. Scarfe*, 1 *Atk.* 605. They are, "An equity of redemption has always been considered as an estate in the land," &c.

(b) *Casborne v. Scarfe*, 1 *Atk.* 603.

(c) The observations of Sir *W. Grant* in Lord *Cholmondeley v. Lord Clinton*, are not quite consonant to the above. "Although the equitable ownership be in the mortgagor, yet his ownership is of a more

precarious nature than that of any other *cestuy que trust*. In general, a trustee is not allowed to deprive the *cestuy que trust* of the possession, but a mortgagee may assume the possession whenever he pleases, and therefore the mortgagor is called tenant at will to the mortgagee; and, in point of possession, he is so even in equity: for a court of equity never interferes to prevent the mortgagee from assuming the possession." 2 *Meriv.* 339.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

*Cestuy que trust* actually and absolutely seised of the freehold in consideration of this court, and therefore the legal consequences of an actual seisin of a freehold, shall follow for the benefit of one in the *post*.

the substantial rules of property certain and uniform, be the mode of following it what it will.

So that, I take it, by the great authority of this determination, on clear law and reason, *cestuy que trust* is actually and absolutely seised of the freehold in consideration of this court (a); and therefore that the legal consequences of an actual seisin of a freehold, shall, in this court, follow for the benefit of one in the *post*.

To conclude this head. An use or trust heretofore was (while it was an use), understood to be merely as an agreement, by which the trustee, and all claiming from him in privity, were personally liable to the *cestuy que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared, it results by necessary implication; because the trustee is excluded, except where the trust is barred in the

(a) Lord Thurlow in *Shrapnell v. Vernon*, 2 Bro. C. C. 268, observes, that, "in many acts of parliament, an equitable is considered the same as a legal estate; the words *seised* in law or in equity, in the Qualification Act, shew that the word *seised* is applicable to both;" and again, "the only question is, whether the word *seisin* will extend to being seised of an estate in equity, which, unless I am mistaken, in point of law it will." So also in the judgment of Sir W. Grant in *Lord Cholmondeley v. Lord Clinton*, his Honour considered it clear that there might be what was deemed a *seisin* of an equitable estate, though his opinion upon the third point in that case was founded upon the impossibility of the equitable ownership being the subject of *disseisin*. *Vide* Lord Grenville v. *Blyth*, 16 Ves. 224.

case of a purchaser for valuable consideration without notice.

The trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. There is no distinction now between those in the *per* and *post*, except in that case of dower which is founded, not upon reason, but practice.

As the trust is the land in this court, so the declaration of trust is the disposition of the land. Therefore an essential omission in the legal disposition shall not destroy the trust. As where trustee dies before testator, or is incapable, upon the old notion of an agreement, a *subpœna* could not lie against the heir, where the legal limitation was void.

The grounds why the lord by escheat neither took nor was subject to an use, do not now subsist: the principles upon which the question must now be argued have no relation to it, whichever way it ought to be determined. Or, rather, none of those principles were made, or could ever be considered in the law of uses, for this court never interposed in cases where the claim was in the *post*; and there, in *Edward* the 4th's time it is taken for granted that the lord shall not have it. It is a fixed principle that he shall not, because he is in the *post*.

2. This brings me to consider the nature of this right by escheat.

It has been truly said in the beginning of feodal tenure, this right was a strict reversion. The grant determined by failure of heirs, the land returned as it did upon the expiration of any less temporary interest. It was no fruit, but the extinction of tenure (as Mr. Justice *Wright* says); it was the fee returned.

This holds equally, whether the investiture was to general or special heirs; for, originally, by the feudal law

1759.

BURGESS

v.

WHEATE.

The  
ATTORNEY-  
GENERAL

v.

WHEATE.

Trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust.

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

the tenant could not alien in any case without the lord's concurrence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what, in point of law, amounted to a consent to a new investiture or change of his vassal. This is the meaning of the distinction taken in the books, which mention that nothing escheats where the tenant is in by the title. Any man in possession, by being tenant to the lord, could not strip him of the reversion. Hence it followed that the land returned in the state in which it was granted, free from incumbrances.

As soon as a liberty of alienation was allowed without the lord's consent, this right changed its name. It became a sort of caducary succession. Thence the lord was called *tanquam hæres*, *Craig. l. 2. c. 2. s. 12—15*. Lord takes as *ultimus hæres*, &c. The resemblance of the lord's right by escheat to the heirs by descent does not hold throughout; and therefore the lord by escheat is, in *Co. Litt. 215 b.*, with accuracy considered as assign in law. He took no possibility, or condition, or right of action which could not be granted. He could not elect to avoid voidable acts, as feoffment of an infant with livery. But every right preserved to the heirs which could be granted goes to the lord by escheat. As if tenant makes lease for life, reserving rent to him and his heirs, the rent will go to the lord as well as the inheritance.

*Thruerton v. Attorney-General*, 1 *Vern.* 340. The benefit of a trust term in an estate was decreed to the king by escheat; for, says the court, the term goes with the inheritance by express limitation of the parties. The inheritance is escheated in the same manner as if it had descended or been granted.

Where the former owner has made no disposition, or left no heirs by blood, it must go somewhere. It is ar-

bitrary before settled; when settled, it is as favourable as any other positive rule. From the original nature of the tenure, the lord took it. In personal estates, which are allodial by law, the king is last heir where no kin; and the king is as well entitled to that as to any other personal estate. This brings me to the third head.

3. Whether, failing heirs of the trustee, the king must not, in this case, have taken the estate in a court of equity subject to the trust. This seems in the present case to be a very material consideration. For if the king is not to be subject to the trust, there is no colour that he should claim the trust by escheat, though barely being in the *post* seems no objection now. That land escheated should be subject to the trust, seems to me most consistent with the lord's right, whether the escheat be considered as a reversion, as it once was, or a caducary possession *ab intestato*, as it now substantially is.

Considering it as a reversion. The king as a reversioner could not claim it in this case, but, under the deed of 1718, as the investiture under which his tenant died seised. There is no other way of shewing his trustee to have been tenant at all: the possession was with Mrs. *Harding* to the time of her death. Every alienation of a fee has some investiture. The land descends to the alienee's blood, and when that fails the lord takes. But the lord cannot claim against his own grant. He is bound by the terms of the alienation. If Mrs. *Harding* had made a will, how could the king claim against the deed made by the grantee to empower her to make a will? The king could set up no right by escheat to defeat the execution of that power. There is but one case in which a possibility of reverter could remain after a fee granted, and that is where lands are granted to a corporation, if the corporation is dissolved, the lands return to donor or his heirs.

The king cannot claim by escheat contrary to the terms or conditions which the tenant held under. Two things:

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

first, That there is equity against the king; secondly, That the lord is bound as much in a court of equity by the equitable terms of his tenant's investiture, as he is in a court of law by the legal terms.

Taking the estate as a caducary possession. The lord can only take it *ab intestato* absolutely. So far as the tenant has not disposed of the estate he can take, and no farther. The tenant's power of disposing is absolute without the lord's privity, without any determined form of conveyance. The trustee has, by his declaration of trust in 1718, made a valid conveyance of his trust in equity; and therefore a court of equity cannot, I apprehend, suffer the land to go as undisposed of by the tenant, because, in the consideration of this court, there is a valid disposition made by him. But even at law the escheat would not be free from the trust. The statute of frauds makes a trust estate assets in the hands of the heir of *cestuy que trust*, consequently for that purpose the estate descends to the heir. In 18 *Car.* 2, before trusts were put on the rational footing they now are, the apprehension of the judges was, that the lord by escheat ought to be subject to the trust. Lord *Bridgman* thought so (a). In 1702, Sir *J. Trevor*, upon the same principle, thought so, in *Eales v. England*. Yet Sir *J. Trevor* certainly knew there could be no escheat of an use. If it were not to be subject to the trust, I think the inconvenience would be very great, and where we are not tied down by any erroneous opinions, which have prevailed so far in practice that property would be shaken by an alteration of them, arguments of convenience and inconvenience are always to be taken into consideration.

(a) The Editor has consulted the report of Lord C. J. *Bridgman*'s judgment in *Geary v. Bearcroft*, from his own note-book, *Harg.* MSS. from whence it appears that he did not express the opinion attributed to him. See it referred to, 1 *Fonb.* on Eq. 169.



All the great estates of this kingdom almost are now limited in trust. The trustees are generally men of business concerned for the family, and at a little distance of time probably their pedigrees are not to be traced. And if the surviving trustee were to die without heir, it would be thought very hard if that were to lose the estate.

But I rest upon this. It seems to me a contradiction in terms that he who has no claim but *ab intestato*, where the owner has not disposed of his property, should take contrary to, and in prejudice of his disposition. The heir of blood might as well claim the estate in contradiction to the equitable charge.

An escheat is as much a title under the former owner, by consequence of his former seisin, as the heir's. Why else shall the lord be deemed the assignee or heir of the tenant? I think the lord may be as much considered his heir as his heir by blood, and is as much liable to all the dispositions.

Suppose a devise ineffectual at law, but good in equity; would the estate escheat free from the trust? Suppose a devise to a trustee in trust to pay debts and legacies, and trustee dies without heir; are all these charges to be gone, and not carried into execution, and the estate to escheat free from them? To bind the lord there is no distinction between voluntary and meritorious limitations. The lord by escheat must, in consequence of the tenant's disposition, be a trustee for all or none.

But objections have been made to subjecting the escheat to trusts.

Objection 1. From copyholds, and the custom of manors. There the lord cannot be subject to trusts, but takes the estate on the death of the tenant without heir.

This objection proceeds from not distinguishing between freehold and copyhold manors. In all manors where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

1759.

BURGESS

v.

WHEATE.

The  
ATTORNEY-  
GENERAL

v.

WHEATE.

In freehold manors, the lord is considered as much bound as if he were a party to the deed of alienation, because the power which the tenant has is equivalent to his consent.

those copyholds the lord is not bound by debts, alienation, or trusts; they are all void against him (a). But if he consents to a condition or trust on the court roll, then he is bound by it, for he cannot claim against his own act (b). But in freeholds, the form of his concurrence not being necessary, he is always considered as much bound as if he were a party to the deed of alienation which makes the trust; because the power which the tenant now has by law, is equivalent to the lord's consent to the grant when it was a strict reversion.

Objection 2. If the trustee is not to be considered as tenant without regard to the trust in the case of escheat, then the lord cannot be permitted to consider him as tenant in case of heriot and relief. *Brown's case, Vern.* (c)

If the objection is applied to copyhold manors, it receives the same answer. The roll shews the tenure. If applied to freeholds held of the king, or mesne lords, the case of heriots and reliefs is of no great consequence. But, however, the lord cannot be hurt: for a conveyance in trust would be void and fraudulent against the lord in respect of them. The *cestuy que trust* is the visible possessor. And I should think, in the present case, if a heriot were due from the tenant, the deed of 1718 is void against the lord in respect of heriots and reliefs. See how it stands. Mrs. *Harding* kept possession till her death. The lord could not know of this secret deed made by her in trust for herself, or where the deed was; and she would be considered as his tenant. But suppose he knew it, and chose to consider the trustee as his tenant at law; I think he may do it in all cases where the trustee is party to the conveyance, and has accepted

(a) *Vide* the Lord Chancellor's observations in *Peachy v. the Duke of Somerset*, 1 *Stra.* 454.

(b) *Vide* the *King v. Had-denham*, 15 *East*, 436.

(c) *Ante*, p. 200.

estate; and then no colour for a court of equity to interpose. The trustee cannot object, because, by his agreement, he has made himself liable to the burden annexed to the estate; and he cannot be prejudicial, as the estate is a pledge in his hands to reimburse. And where trustee is the visible tenant, the lord only consider him as tenant. The mortgagee in fee would be tenant to the lord in respect of his heriots and fines, and he could not come on the mortgagor for them while the estate remained unredeemed. But where an escheat happens, it does not follow but that the court will interpose to substantiate the agreement of the parties, though they do not when there is no agreement.

Objection 3. It was said a mesne lord, by death of mortgagee without heirs, can take the escheat in preference to the personal representatives, who are entitled to the money, and in opposition to the mortgagor who is entitled to the redemption.

This would be glaring injustice. *Pawlett's* case seems founded on a true foundation, and this precise objection in terms overruled. Lord *Hale* says the tenure is extinguished, but it is overruled. Another answer that the lord may continue the tenure by accepting *cestuy que trust* as tenant. If the lord admits the mortgage, there will be no escheat. The king and the lord together may revive the tenure. Another answer that the king is, that if the tenure was destroyed, any benefit arising from it to the lord might be secured by a decree that he should hold and enjoy. The last answer is, that if it should extinguish the tenure, the law never thought that sufficient to abridge the tenant's absolute right of alienation. In the case of a grant in mortmain.

It is said that the king must take it free from the mortgage, because the king cannot re-convey it; but this would hold equally in the case of mortgages, and the

1759.  
BURGESS  
v.  
WHEATH.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATH.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

purpose might be answered another way; there might be a decree to hold and enjoy: if it were so, it is strange to say that therefore he shall lose the whole estate, and have no relief at all.

Fourthly. If what I have said be right, little is left for me to say upon this head. If the lord takes an escheat as heir or assignee in law, then the king is within the express declaration of trust, which is to *Elisabeth Harding*, her heirs and assigns. If the king would take it subject to trusts, he must, of course, be entitled to an equitable estate by escheat. He can be subject to the trust on no other ground than that *cestuy que trust* (the true owner in the consideration of a court of equity), dying *sans* heir, the escheat is to arise; for else it would be a fee on a fee. It would be to *cestuy que trust* and his heirs; and for want of such heirs, to the trustee and his heirs, which is void in law because of the lord's escheat.

If the trust be the land, Mrs. *Harding* died seised of the old use of that land. The king's right by escheat stands on the same ground as every other legal right; it arises out of the seisin. And Lord *Bacon* says, they who come in by justice and consideration of law are of all others most favoured. On that principle stands the forfeiture by escheat, the tenancy by curtesy and in dower. 27 H. 8. expressly recites this grievance, and a wise plan in equity is established by considering the trust as the lands to avoid every inconvenience that arose from an use.

As to Sir *George Sands's* case, it has great weight; but I cannot agree, when a trust descended to the heir, that the heir should take the land free from the specialty debts of the ancestor; there the trustees, the heirs of blood to the felon, and Sir *R. Freeman*, were all in the same interest. If it had been adverse, perhaps it might

have been argued that it resulted to Lady *Sands*, the daughter and heir of Sir *Ralph*. The trustee could take nothing to himself against the former owner and his heirs. The circumstances of that case were compassionate. If the king had restored the estate to the family, and the trustee had insisted upon keeping it, it would have undergone a different examination from what it did.

The principal reason is, that escheat is for want of a tenant. A trust is like a rent-charge: when it fails it extinguishes in the estate for the benefit of the owner. There can be no escheat of an use (the second reason) seems incorrect; the escheat is for want of a tenant; the lord being assignee here is a tenant at law. It does not prove but that there may be an estate in the trustee.

It is said the escheat is in lieu of services. True; but it does not conclude but the tenant may be a trustee. There is a declaration that trust does not extinguish for benefit of the trustee, but of the true owner; which is clearly settled. The reasoning with regard to those who claim in the *post* does not conclude one way or other; but, in fact, the true foundation of trusts was not then laid. Lord *Hale* himself had held, a trust descended to the heir was not liable to debts; he went upon a principle that failed, and whatever is built upon it fails with it.

It is matter of importance to settle upon what principles the present determination is made; because many consequences may hereafter be drawn from it. If mortgagee in fee dies without heir, it is now settled the estate escheats subject to the mortgage, and the money must be paid to the personal representatives. But suppose mortgagor dies *sans* heir, shall the mortgagee hold the land absolutely? If he demands the money of the personal representative, shall he have the money and the land too? If not, to whom shall he convey it? If to the king, then a right of escheat followed in equity by ana-

1759.

*BURGESS*  
v.  
*WHEATE.*  
The  
ATTORNEY-  
GENERAL  
v.  
*WHEATE.*

*Per L. C. J.*  
Escheat is for  
want of a tenant.

*Per L. C. J.* No  
opinion given as  
to the case of  
mortgagor dying  
without heirs,  
and mortgagee  
in possession  
coming against  
the personal re-  
presentative for  
the money.

1759.

~~~~~  
 BURGESS
 v.
 WHEATE.
 The
 ATTORNEY-
 GENERAL
 v.
 WHEATE.

logy. I do not say on any ground established what must be the determination in that case (a). It must be upon reasoning, not upon principles yet settled. Whether it may not be reasonable, under particular circumstances, cannot be questioned. This court does not act arbitrarily, but by a system of equity, which is as much the law as that on the other side of the hall.

In case of felony, shall the trustee hold against the felon if pardoned, or against the heir of the ancestor executed, although the king would restore it (b)? I cannot answer it upon principles; I can find no clear and certain rule to go by; and yet I think equity should follow the law throughout. Yet I am satisfied it must shock common sense, that the heirs of an attorney or trustee should take the estate from the family of the owner, the king, and every body else. The least analogy to any legal right ought to be preferred to the trustee, who is the mere form and instrument of conveyance.

Thruwton v. Attorney-General shews a right by escheat is a ground to come into equity against a trustee to pray conveyance. *Palmer v. Attorney-General*, before Lord *Nottingham*; after stating the case, he concludes—Note, if a forfeited mortgage in fee escheat to the king, yet mortgagor's equity of redemption is not lost, though the king comes in the *post*. If then there be equity against the king's escheat, why should there not be equity for it? And so he orders a case to be made and argued, and decreed that there was an equity for the king's escheat.

The exclusion of the trustee from all benefit was surely in the contemplation of the parties. To determine otherwise would be to contradict the deed of 1718. The

(a) *Vide ante*, p. 211, the p. 259.
Master of the Rolls's opinion (b) *Vide ante*, p. 210, and
 upon this point; and *post.* *post.* p. 254.

death of *cestuy que trust sans* heir was not at all thought of. They have declared the trusts, and that there should be no other. Whatever results necessarily from the agreement was the intent of it. The holding to other purpose than on the trusts could never be intended; he is to hold to no other purpose.

It has been said the declaration and agreement cannot extend to the land, for that the trustee holds it subject only to the trust created by, or arising from the deed: and if so, the lord here takes an interest which could not even have been given him by express limitation; for it is said that the trust could not have been limited to the lord on failure of heirs to Mrs. *Harding*, because it would have been a fee on a fee, and therefore void. *Vaugh.* 270. But I apprehend that the limitation of a trust to the lord failing heirs of Mrs. *Harding*, would have been good, because such a limitation would have been good in law, and is implied in the conveyance of every legal fee.

Upon the whole, I think the king is entitled to a decree; but if I am wrong in the principles I go upon, or (as is possible), in the application of them, if the deed of 1718 has conveyed a new fee, and changed the line of heirs, upon which the escheat was to arise in this court as well as at law; then as between the heir *ex parte materna* and the trustee, I think the heir is entitled to a preference and a decree.

Before 27 *Hen.* 8. if a man conveyed to the use of himself and his heirs, the *Chancery* thought that no change of the seisin was intended by such conveyance. And they decreed the estate to go as the old use would. The court never decreed against estates in the *post*. The trust should ensue the nature of the use executed; but it settled that the lord shall not be entitled by escheat, as if the old estate continued, and then a new question arises between the heirs of the old purchase and the

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-
GENERAL

v.

WHEATE.

Limitation of a trust to the lord failing the heirs of *cestuy que trust* would have been good, because such a limitation would have been good at law, and is implied in the conveyance of every legal fee.

1759.

~~~~~  
 BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

A trustee cannot,  
 by delaying a  
 conveyance,  
 create a benefit  
 for himself.

trustee: *Elisabeth Harding* was seised *ex parte paternâ*; and whether she has acquired a new fee, can only be disputed by the lord of the fee. *Co. Litt.* 12. The feoffee cannot restrain the rent or condition to the paternal line.

Suppose trustee covenanted to convey to Mrs. *Harding* and her heirs, he cannot say that it is restrained to her heirs *ex parte paternâ*. If he had reconveyed to her in this case, it would have descended to the heirs of purchase, and consequently in the event that has happened to the maternal heir; and there is no instance where a trustee can, by delaying conveyance, create a benefit to himself, though he is never called upon so to do. When the blood of the grantee fails the lord is entitled.

In justice to the maternal heir entitled under the old investiture, it was before the statute of *Hen. 8.* and is now presumed in equity, that the owner meant no alteration of the old seisin by the conveyance in trust, which left the estate and ownership as it was. So that the conveyance leaves the estate just as it was. I think the reason should not be confined to the heirs under the old investiture, but should be extended to the lord. But if the lord is out of the case, there seems no reason to confine it to the paternal line. As between the heir and the trustee, as between Mrs. *Harding* and her trustee, the deed of 1718 is an original act, and the trustee's title is wholly derived under this deed; and every reciprocal engagement on his part to Mrs. *Harding* and her heirs is confined to that deed. Both lines are of her blood, and within the term heirs in the agreement, and within the express terms of his undertaking, and not only by necessary implication; but the trustee is intended to take no benefit himself from the natural affection which Mrs. *Harding* may be supposed to have for all the heirs of her blood. There is no case that the feoffee shall exclude the heirs by purchase, for his own benefit; no saying in



the books before or after 27 *Hen.* 8. to this purpose ; and in my apprehension it is as much against conscience, as law, upon the reciprocal agreement. To establish a trust for his own benefit, and to restrain his engagements made to *Elizabeth Harding* and her heirs, to the paternal line, seems unreasonable.

With regard to the preliminary points, they are so clear, that I shall say nothing upon them.

I am sorry to have taken up so much time. I thought it necessary to do it, as I differ from so great authority.

*The Lord KEEPER.*

There is one objection and two claims upon which I am now to deliver my opinion. I agree entirely with the Lord Chief Justice, and his Honour, as to the objection. As to the other points, I think myself very much obliged to the Lord Chief Justice, and his Honour, and return them many thanks for their learned assistance ; and their free and unreserved communication of their sentiments to me, during all the time that this matter has been under consideration.

I shall first take notice of the claim of the crown, because several of the arguments which I shall make use of on that will tend to support the opinion which I shall give on the other claims.

The question upon the information in this case is, whether the *cestuy que trust* dying without heirs, the trust is escheated to the crown, so that the land may be recovered in a court of equity ; or whether the trustee shall hold the land for his own benefit ?

It arises on this case ; Mrs. *Harding* being seised in fee *ex parte paternâ*, 11 *January*, 1718, conveys to trustees, of whom Sir *F. Page* was the survivor, the lands in question, in trust for Mrs. *Harding* her heirs and assigns, to the intent that she should appoint such

1759.  
BURGESS  
v.  
WHEATH.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATH.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

estates, and to such persons as she should think proper, and to no other use, intent, or purpose whatsoever. Mrs. *Harding* makes no appointment, but dies without heirs *ex parte paternâ*.

Upon which case, the information charges, that the trustees had not any beneficial interest by the indenture and fine, but were only nominal trustees for the benefit of *Elizabeth Harding*, or such persons as she should appoint, and in default of such appointment, for her heirs on the father's side, and she being dead without any heir on the father's side, and without making any disposition by will or otherwise, Sir *F. Page* took no estate for his own benefit, but was a trustee, and held for the benefit of his Majesty, who stands in the place of the heir, and that the said premises are escheated to his Majesty.

The question therefore is a question merely of tenure, and the rights resulting therefrom *ob defectum tenentis*, and not a question of forfeiture.

The method in which I shall consider it is this. *First*, what are the rights of the crown, and other lords, with regard to escheats at law? *Secondly*, Whether they can or have received different considerations or modifications in a court of equity? And in the course of this argument, and in the conclusion of it, I shall give such answers as occur to me, to the reasonings which have been urged in support of the information; and from the whole, will be seen the grounds from whence I draw this conclusion, that the crown has in this case no equity.

I will be as little tedious as I can, considering how largely and ably this subject was discussed at the bar, and the less so, because I shall, as much as possible, consider this right as it is settled and described by our municipal writers and reporters, without examining or regarding what it was in other countries where the laws

seem to have been calculated for empire and vassalage, neither of which will, I hope, ever creep into our system; and I think I am warranted in this observation by the feudists themselves, one of whom I shall quote to justify me in neglecting all the rest.

*Craig*, 514, enumerates the causes of amission of the feud thus: 1. Incest, or incestuous marriage. 2. Fratricide. 3. Parricide in a large sense. 4. Friendship contracted with the lord's enemies. 5. Revealing the secrets of the lord if they may affect his life, reputation, dignity, or patrimony. 6. The non-production of any of his family to answer the lord. Lastly, all other causes in the discretion of the prætor.

The legal right of escheat arises under the law of enfeoffment, by which, with us, the lord gave the land to the tenant and his heirs, under a tacit condition to revert, if the tenant died seised without heirs (*a*). This was the

(*a*) *Mr. Fazakerley*, in the "Observations" alluded to in the note at the end of this case, suggests a doubt as to the propriety of this doctrine, inasmuch as it supposes a priority of the dominion antecedent to the creation of tenancies; whereas manors, courts baron, the oldest tenancies and escheats, seem of equal antiquity without any priority, all of them taking their rise from the common law. That it is the very essence of a manor to have demesnes and services: the want of either being a destruction of

the manor, and consequently there must have been tenancy in being, or created at the same time when the manor was first created, because a manor could not exist a moment without tenants, subject to services; and further, that courts baron are incident to every manor; and though the court be held before the lord, or his steward, yet the suitors, viz. the tenants, are the judges. For these reasons he concludes, that some tenants are as ancient as manors themselves, and if so, it is difficult to say,

1759.  
BURGESS  
v.  
WHEATH.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATH.

The legal right of escheat arises under the law of enfeoffment, by which the lord gave the land to the tenant and his heirs, under a tacit condition to revert, if he died without heirs.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

The latitude given to the donee to hold to himself, his heirs and assigns, reduced the consideration of reverter to the single event of *defectum tenentis de jure*.

last and most liberal enfeoffment, for it was different at different periods of time.

The extension of the feudal donation or enfeoffment, from the person of the tenant to the heirs special of his body, or to the heirs of his body in general, and then to his heirs and assigns, is curiously traced and accounted for in a book, properly entitled, *A Treatise of Tenures by a Learned Hand (a)*.

This latitude given to the donee to hold to himself, his heirs and assigns, reduced the condition of reverter to this single event, *ob defectum tenentis de jure*.

In F. N. B. tit. Writ of Escheat, 4to ed. fo. 337. it is said the writ of escheat lieth where the tenant, who hath an estate in fee-simple of any lands or tenements, and holdeth them of another, dieth seised without heir general or special, the lord shall have the writ of escheat against him who is tenant after the death of his tenant; and by this writ he shall recover his land, because he shall have the same in lieu of his services.

Now the books are uniform, that in this event alone, (except in the case of tortfaisors,) the escheat took place. As long as the tenant in fee stood by himself, or his representatives as tenant, or by his own act, or implied

that the law of escheats arises under the law of enfeoffment to the tenant and his heirs, which supposes a priority of the domain before there was any tenant.—*Coxe's MSS.* This reasoning is open to the same objection as that made by Sir *M. Wright*, 159. n. to the doctrine of *Brook, Roll*, and

*Finch*, viz. that the like reasoning might have prevented any manors at all; for the court was dependent on the manor, not the manor upon the court. The manor was the principal, the court only the incident. See also *Watkins* on Copyholds, 18, 19.

(a) *Wright's Tenures*.

assent, to the seisin of another, supplied the lord with a tenant, the lands could never escheat.

The law seems to have had no regard to the tenant's right to the land, but only to his right of seisin; and therefore, in every case where the tenant was seised *de jure*, no escheat could happen on the death of that person without heirs who had undoubted right to the land.

In *Rol. Ab.* 816. cited from 3 R. 2. If tenant be disseised, and the disseisor by fine grants and renders the land to one in tail, remainder to another in fee; and after the tenant in tail dieth without issue, and he in remainder enters, and after the disseisee die without heir, this right shall not escheat to the lord, because he hath another tenant by title. If there be lord and infant tenant, and the infant makes a feoffment in fee, and executes it by livery of seisin with his own hands, and afterwards dieth without heir, the lord shall not take the benefit of any escheat. *Whittingham's Case*, 8 Rep. So in the 7 H. 4, p. 17. *Bro. Ab. Tit. Ent. Cong.* p. 20, *Markham, J.*, pur ley: "*Si seignior et tenant sont, et tenant est disseisee, et devie sans heir, le seignior poet enter pur l'eschete, car il est torcious faisor: contrarium sur l'heir le disseisor ou son feoffee, car ils sont eins per title.*" So in 1 Inst. fo. 268 b. If the disseisor makes a feoffment, or die seised, and after the disseisee die without heir, then there is no escheat, for the lord hath a tenant by title.

The answer given by the *Lord Chief Justice* to these several cases was, that the lord by the general grant or investiture to the tenant, his heirs, and assigns, virtually assented to, and was party or privy to the introduction of the new tenant, but this seems to be no answer to the case of persons coming in by title under tortfaisors; and besides it proves too much, because it proves the right of

1759.

BURGESS  
v.  
WHEATH.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

The law of escheat had no regard to the tenant's right to the land, but only to his right of seisin.

1759.

BURGESS

24 Ch. D. 305. v.

WHEATE.

The  
ATTORNEY-  
GENERALv.  
WHEATE.

the trustee who holds against the lord as assignee of the legal estate.

I think from these authorities, it is as well founded as any proposition in law, that the law does not regard the tenant's want of title, as giving the lord any claim by escheat.

The next consideration is, whether equity *has* considered, or *can* consider the matter in any other light. That is to say, whether, when the tenant did not die seised, but there was at his death a legal tenant by title, and consequently the lord's seignory and services still continued, this court can say to the lord, your seignory is extinguished in equity, to the tenant, your tenancy is extinguished also, though both are legal rights, and both subsisting at law.

It seems pretty certain, that in the consideration of uses, with regard to escheat, courts of equity proceeded upon the same principles as the law; and if there was a tenant seised of the land to perform the services, had no regard to the *merum jus* of the tenant.

The reason why there was no escheat on the death of *cestuy que use* in equity was, that on such event no use remained, and consequently no grounds for the *subpœna*.

The reason why there was no escheat on the death of *cestuy que use* without heirs in a court of equity seems to have been, that on such event no use remained, and consequently there were no grounds for issuing the *subpœna*. A use could not be extended further than the *cestuy que use* could have held the estate in possession; to him, his heirs, and assigns.

*Mic. T. 5 E. 4. "Seignior et tenant sont, le tenant  
"enfeoffa un sans volunt expresse, et fait felony et est  
"attaint; quære qui avera le subpœna; le seignior  
"n'avera."* This is an express declaration, as far as the authority of the year' books goes, that the lord in this case has no equity for the *subpœna*.

Lord Bacon in his reading on the Statute of Uses,

fo. 79, cites this case, and does not question the authority of it, but seems, as far as I can conjecture his meaning in that misprinted passage, to give this reason; because the feoffee's (a) intent was never to advance the lord, but his own blood, that is, as uses were raised and directed by the intent of the parties; and the party's intent was confined to his own blood, the use vanished with *that*; and the estate upon failure of heirs was discharged of all equity, and consequently of all equitable jurisdiction. I do believe that Mrs. *Harding*, when she executed this conveyance, had no consideration of the preference of the trustee or the crown; but had the case been put to her, whether on the event which happened, the crown or trustee should have the estate, I cannot but think she would have preferred her friend and trustee before the crown.

But it was said by the *Lord Chief Justice*, that the crown will take as assignee the trust expressed, under the word *assigns* in the deed; or that a trust after the declared trust will result according to the incidents on the estate at law, if no conveyance in trust had been made.

As to the first: in our law the word *assigns* is void. It is *expressio eorum quæ tacite insunt*, and *nihil operatur*, and must therefore be confined to the actual assignees. As to the second: a trust can only result in lieu of the inheritance conveyed without consideration; but none in this case is conveyed by the lord; *ergo*, none could result to him. None could, I think, be declared; for the grantor could not limit a fee on a fee; and a limitation and reverter are obviously different.

As I am now stating the law and equity of escheat with respect to uses, I will take notice of an objection urged with much force, and which equally affects uses and trusts.

(a) Should be *feoffor*, and to it, where the whole passage is rendered completely clear. vide Mr. *Rome's* edition, page 12, and the ingenious note.

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

No trust can result to the lord, as a trust can only result in lieu of the inheritance conveyed without consideration, and here none is conveyed by the lord.

[ 246 ]

1759.

~  
 BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

A dilemma was advanced in support of the information, and as one great basis of its equity, viz. that the lord must have the escheat, either on the death of *cestuy que trust* without heirs, or on the death of the trustee without heirs, discharged of the trust; but if he cannot have the escheat in equity, while the trustee stands tenant, it would be monstrous and absurd that the *cestuy que trust* should be prejudiced in putting the estate in trust for the convenience of his family.

If it be so, that on *that* event the lord shall take it discharged, I must conclude there is nothing absurd or injurious in it. The law is known, and *volenti non fit injuria*. The creator of the trust determines to take the convenience of a trust, with its inconveniences. It is most certain, that every man who creates a trust puts his estate into the power of his trustee; for if the trustee sells for a valuable consideration without notice, no court can relieve him from his misfortune, the result of his own act. As I do not however know that the position, that, on the death of the trustee without heirs, the lands shall escheat discharged of the trust, has been judicially determined, I shall give no unnecessary opinion upon that point (a).

But so far is clear and certain, that unless trusts can be distinguished from uses, the most learned judges saw that the only stipulated point of reverter, being the event of default of a tenant, in that event alone the escheat could take place in law or equity; and that the rights of the lord being paramount, the trust could not be affected with it.

1 Rep. fo. 122. *Chudleigh's* case. The lord by escheat

No opinion given as to whether lands escheat discharged of the trust on the death of trustee without heirs.

(a) Though the point had not been judicially determined, yet Lord *Macclesfield*, in *Peachy v. the Duke of Somerset*, 1 *Stra.* 454, had treated it as quite clear, that if the trustee should die without heir, the lord would be entitled by escheat without being subject to the trust.



shall not stand seised to an use, because he is in by title paramount to the use, *scilicet* by force of a condition in law tacitly annexed to the estate of the land at the time of the creation of the seignory; and the tenancy came in lieu of his seignory, which he hath to his own use: and also he is not in in the *per*, that is to say, in privity of estate, to which the use is annexed. And fo. 139, in the same case, *Popham*, C. J., says, the reason why the lord by escheat shall not stand seised to an use (taking it as known law that he should not), is by reason of his elder title, which title is higher and elder than the use and confidence is, and therefore should not be subject to it. It is here to be observed, that the expression, *shall not stand seised to an use*, must mean, shall not be responsible to the *subpœna*; because a use was a nullity, and of no consideration in law.

But, for my own part, I do not think this a necessary dilemma, as the logicians call it. The lord may not be entitled to the escheat on the death of *cestuy que trust* without heirs, having no equity, because he has still his tenant and services. He may, perhaps (I say *perhaps*, for I mean to give no opinion on this point), be charged by the strength and refinement of equity, together with the legal reformation of tenures, with the trust; because I cannot suggest a case where this court could not allow the lord to retain a compensation for the services that *now* subsist at law, and then no injury is done to the lord.

It seems to me, therefore, clear, that during the existence of trusts under the name of uses, to the time of their extinguishment, or rather new modelling, after the statute 27 H. 8., Courts of Equity, as well as Courts of Law, confined escheats to the original compact *ob defectum tementis*.

And, in truth, the concurrency in judgments of this

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

court, and the courts of law upon escheats, was so fully established, and with such harmony in the books, that it was admitted at the bar, that if modern trusts could not be distinguished from ancient uses, the precedents would be too strong against the claim of the crown in this information. It was undertaken, therefore, to shew a difference; and uses were represented as bad modifications of property, destined to ill purposes, and discountenanced at law. But in this respect trusts may, and often do, resemble them; are formed for the worst purposes: I have seen several made purely to promote frauds, and some to subvert the present constitution. But this is not the essence of the one or the other, it is the abuse of both.

The *Lord Chief Justice* admits, if I understood him, that in essence they are the same; but that in the principles and rules applied to them, the difference is great. I think, on the contrary, that there is no difference in the principles or rules, though there may be in the extent of application of those principles and rules. Geometry was the same in the time of *Euclid* as in that of *Sir Isaac Newton*, though he applied the principles and rules to effect greater discoveries and more important demonstrations. But let us see what they are, and we shall see wherein they differ.

“*Quant ascun home ad ascun chose al auter use, sur confidence que auter prendera les profits, cesty qui avera les profits est dît d’aver un use. Le quel use al common ley fuit accompt riens, mes un matter en conscience et Chancery solement.*” *Finch del Ley*, B. 2. Ch. 2. f. 22 b. An use, say the other books, was neither *jus in re*, nor *ad rem*, but a confidence resting in privity of person and estate, without remedy, but in a court of equity. What else is a trust? What other definition can be

The difference between uses and trusts does not consist in the principles and rules applied to them, but in the extent of the application of those principles and rules.

given of it? No other is attempted. But it is said since the existence of trusts (since the statute), equity has modelled them into the shape and quality of real estates, much more than it did in earlier times when they were called uses. It has made tenants by the curtesy, permitted tenants in tail to suffer common recoveries, &c. And why? Because equity follows the law. And as between the *cestuy que trust* and those claiming by, from, and under him, it is equity that he should be considered as formally possessed of that estate of which he is and appears substantial owner.

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

But this is only the effect of the equitable jurisdiction's growing to maturity, and was an accident that to a degree accompanied uses as well as trusts. Lord *Bacon* observes that they grew to strength and credit by degrees, and as the *Chancery* grew more eminent. The quality of them was the same from their first existence to their extinguishment. An use, says that great writer, is nothing but a general trust, where any one will trust the conscience of another better than his own estate and possession, which is an accident or event of human society, and will be in all laws, and were of the same kind as the *fidei commissa* in the Roman laws.

Lord *Nottingham*, very great in the knowledge of law and equity, in the case of Lord *Gray* v. Lady *Gray* (a), 29 Car. 2., where the question was, whether a purchase made in the name of a son was a trust or advancement, was of opinion it was the latter, and that there could be no constructive trust in such case. He grounded himself on this observation. "All the books are agreed that a feoffment to a stranger, without consideration, raised an use to the feoffor; but a feoffment to the son, without consideration, raised no use by implication to the father;"

(a) 1 Ch. Ca. 296. *Finch*, 338.

1759.

BURGESS

v.

WHEATE.

The  
ATTORNEY-  
GENERAL

v.

WHEATE.

and then he adds this impressive question, "How can this court justify itself to the world if it should be so arbitrary as to make the law of trusts differ from the law of uses in the same case?"

Lord *Talbot's* opinion as to the identity of uses and trusts concurred in the case of the *Attorney-General v. Scott, Mic. (a)* 9 Geo. 2., and Lord *Hardwicke* seems to have entertained the same sentiments in the case of *Goodwin v. Winsmore (b)*, 10 Mar. 1742.

It is too much to say, that because trusts are considered as imitating the possession, that therefore the creation and instrument of trust is a nullity.

It is true this court has considered trusts as between the trustee, *cestuy que trust*, and those claiming under them, as imitating the possession. But it would be a bold stride, and in my opinion a dangerous conclusion, to say, therefore, this court has considered the creation and instrument of trust as a mere nullity; and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it. I entirely agree that the rules and maxims relative to succession or other circumstances of property are by no means to be questioned by individuals or judges. While they are allowed and acquiesced in, the consent of the people is the best testimony of their utility and wisdom. None but the legislature can presume to examine or change them. I have therefore the strongest propensity to direct equitable, by a strict analogy to legal, property. I think the nature of my reasoning shews it. And therefore I think it a fallacy in this case to suggest that there is a doubt whether trusts should not imitate lands. In my opinion they have done so from the earliest times, without any distinction but what arose from the imbecility or strength of this jurisdiction.

Objection to the claim of the crown is, that it is for the execution of a trust which does not exist.

My objection to the claim in the information is, that it

(a) *For.* 138.

(b) 2 *Atk.* 525.

is for the execution of a trust that does not exist. Where there is a trust, it should be considered in this court as the real estate, between the *cestuy que trust* and the trustee, and all claiming by or under them; and the trustee should take no beneficial interest that the *cestuy que trust* can enjoy; but for my own part I know no instance where this court ever permitted the creation of a trust to affect the right of a third person.

The transmutation to a trustee is the same in its consequences as the transmutation of possession without a trust; it conveys to the trustee the legal burthens, and it invests the trustee with the legal privileges. The trustee is tenant to the præcipe, and liable to all onerous services. A special privilege of the highest benefit annexed by the common law to the possession of land, could not be separated, retained, or suspended by the creator of a trust; the right of voting for coroners, sheriffs, and members of parliament. The legislature was obliged to interpose for that purpose (a).

Can this court say, the conveyance is a nullity? The trust alters the jurisdiction. The substantial owner, the *cestuy que trust*, shall alone be sued in this court. And the events in the trustee's family shall be barren of services, heriots, reliefs, &c. to the lord. And to preserve the principle contended for with consistency, it must be so said. *Servetur ad imum*.

It appearing therefore to me certain, that at law there can be no escheat while there is a tenant *de jure*, that in equity there was none while trusts were called uses, and that trusts and uses are essentially the same, can I possibly think that I have authority to say, that every lord in *England* shall lose his legal right of escheat in all cases

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL,  
v.  
WHEATE.

The creation of a trust cannot affect the right of a third person.

The transmutation of possession to a trustee conveys to him the legal burthens, and invests him with the legal privileges.

(a) 7 W. 3. c. 25.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

where any man for his own convenience has put his land in trust? It strikes me that this would be *jus dare*, not *jus dicere*.

More than two centuries have elapsed since uses have been extinguished, and trusts have arisen, yet I find not a *dictum* in any book that countenances the present claim of the crown.

On the contrary, there is the opinion of the ablest writers in the law, and a judicial determination against the rights of the crown by a court, in which presided one of the ablest and most learned judges that ever adorned the profession.

*Hale*, P. C. fo. 247, speaking of the forfeitures of trusts in treason, says, "But where the king or a common person is entitled to an escheat in felony, there, by the attainder of *cestuy que trust*, neither lands nor trust escheat; for the escheat is only *ob defectum tenentis*; and in this case the king or lord has his tenant as before, namely, the feoffee in trust, who is attendant on the lord or king for his services. And by the attainder of felony of the feoffee, the lord shall have the land discharged of the trust." It is observable that this accurate writer says, that by the attainder of felony of the feoffee, the lord shall have the land discharged of the trust. He ties up the case to the attainder of felony, which makes an escheat *ob defectum tenentis*, where the lord does not come in in the *per*, but by title paramount. For where a person comes in in the *per*, he takes subject to the terms imposed by the forfeitor. *Stand. P. C.* fo. 186. b. *Pim's case*, *Mo.* 196. *Hix's case*, *Palm.* 176.

The judicial determination is the judgment in *Sir George Sands's case*, 20 and 21 *Car.* 2. 1 *Sid.* 403, more fully reported *Hard.* 488. The case is in every body's memory. The court there had no difficulty upon

part of the case, which is applicable to, and in point the present. All the difficulty arose on the devise of a term, whether it vested in the felon as a term in fee, and become forfeited, or whether, upon the whole, it attended on the inheritance. And therefore, divers arguments on the case, Lord *Hale* delivers his opinion thus: "There is no question concerning the nature of the fee simple in trust, for that must arise by itself, and there can be no escheat but *pro defectu* *titis*, but here is a tenant *in esse*. But whether Sir *George Sands* shall hold the lands discharged of the term, or the crown shall have the term, is the sole question." *E. T.* 21 *Car.* 2. it came on again. The Barons *Turner* and *Turner* delivered their opinions, and concluded. *Turner*, B., founded himself on 3 *Co. Marq. Chester's Case*, 12 *Co.* 1. 2. *Cro. Jac.* 513. It was objected as it is now, as it was in 5 *E.* 4, who shall hold the trust? The *Chief Baron* answers, Sir *George Sands* shall now hold the lands discharged of it, as in the case of a grantee of a rent in fee, who dieth without heir, the tenant of the land shall hold it discharged of the rent, if there is no other that hath any title to it.

Now this illustration by the extinguishment of a rent, the grantee dying without heirs or assigns, is an answer to the objection much insisted on, of want of right and title in the defendant. The grantee purchases the rent for full consideration paid; the grantor grants a perpetual rent out of his estate; an event happens by which there is no owner in existence to call for it. The consequence is, the grantor takes the rent without any other title than that there is nobody to demand it.

But how came the law not to devolve it on the crown as *ultimus hæres*? Because confiscations are repugnant to the genius of a free country, and the law of *Eng-*

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

The illustration of a grantee of rent, dying without heirs or assigns, is an answer to the objection of want of title in the defendant.

Confiscations repugnant to the genius of a free country, and confined to the single case of a vacant possession.

1759.

BURGESS  
 v.  
 WHEATE.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WHEATE.

*land* seems to have confined them to the single case of a vacant possession (where they do not operate as penal forfeitures), and that not so much for the sake of the crown, as to prevent disturbances of the public peace in society.

The judgment that I have stated being an authority in point, great efforts have been made to weaken it. Lord *Hale's* abilities in equity a little questioned—that would not bear commenting upon—then he must be suspected of a little undue compassion, and was determining a general important point with regard only to the compassionate circumstances of that case.—But this observation is as little warranted as that of his want of abilities; for his determination, right or wrong, is founded on large general principles, and Baron *Turner* is passed by without the least respect paid him, and all the writers since who have adopted this determination as law.

I cannot help here remarking, that not one of these great men, in adhering to the above-mentioned opinions, were frightened out of their determination, or so much as alarmed with consequences that now appear so formidable and affecting. Perhaps they considered that no one would be liable to these dreadful events, but by his own act and election; that every one might answer the exigencies of his own family by the use of trusts, and yet execute the limitation in fee; and that a court of equity did not sit to alter the law, in order to cure the oscillancy or inattention of conveyancers.

Whether these considerations affected them or not, I cannot say. But I profess they have that weight with me, that, had I the power, I should not have the inclination to alter the law with respect to the point now under consideration.

However, I think it becomes me to examine particularly the grounds and magnitude of the terrors suggested.



It is said, upon the first conviction of felony, where the king regrants or pardons, mankind will be shocked that the trustee runs away with the estate (a). Now let us see the extent of this objection, which supposes that, if the crown can have the escheat of the trust, this direful calamity will be prevented. In every case where the king is not lord, his pardon would signify nothing, for the escheat arises on the judgment; and if any compassion is due to the felon, it is the same whether his estate is forfeited to the lord or trustee. Indeed, where the king's tenant is attainted of felony, and his estate is in trust, it will not be forfeited, pursuant to the opinion that I hold, and therefore cannot be regranted. But if in that case the king thinks proper to pardon the felon, what hinders him from suing his trustee? What hinders him from instantly assigning his trust for the benefit of his family? which is all he could have done in the case of a regrant, had it been forfeited to the crown; for the king by his pardon could not have purged the corruption of blood, or restored the descent.

It is said, the king upon a legal estate shall be liable to an equity of redemption (b). I do not know that it has ever been so determined. Lord *Hale* thought the king should, because it is an ancient right which the party is entitled to in equity. Baron *Atkins* thought the same, because he saw the same equity against the crown as against a common person. Yet it is observable, that there is in that case (*Pawlett v. Attorney-General*) a recognition of the equity without any declaration of the remedy. Whether this remedy has since been settled in the *Exchequer*, where alone it can, I really do not know: but I hope it

1759.  
BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

(a) *Vide ante*, p. 210, and  
p. 236.

(b) *Vide ante*, p. 203, and  
note there.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATE.

The arms of equity very short against the prerogative.

Case of mortgagor dying without heirs.

Claim of the heir *ex parte maternâ*.

is so settled; for I see a great deal of equity to support the opinion of *Hale* and *Atkins*. A mortgage is an assignment on condition. The condition being performed, the conveyance is void *ab initio*. Equity dispenses with the time, and when the money is paid, the conveyance is void in equity and conscience.

I would by no means have it understood that I think there is any equity that the crown cannot avail itself of — and I hope that there is no equity that the subject is not entitled to against the crown. But I own, upon very diligent inquiry and consideration of the case, I at present think the arms of equity are very short against the prerogative.

The next is an objection by inverting the case of mortgage; and it is asked, suppose the mortgagor dies without heirs, shall the mortgagee hold it free of redemption? I suppose the meaning of that question is, shall not the lord have the equity of redemption? or else it is nothing to the present purpose. If that be the question, it seems to me to be the same with the present — and admits of the same answer; the lord hath his tenants and services in the mortgagee, and he has no right to anything more. Perhaps it would not be difficult to answer what would be the justice of that case, but it is not to the business in hand (a).

For these reasons and authorities, I am of opinion that the information ought to be dismissed.

I shall be very short as to the claim of the heir *ex parte maternâ*, because that claim seems to me to depend on principles in a great measure examined under the preceding question. The judges have in this case given —

(a) *Vide Fancett v. London*, 3 Swa. 470, and note at the end of this case. observations in *Gordon v. Gor-*

their opinions, in which I concur, that if no estate had passed to the trustees by this conveyance, or if it had not \*been executed, the inheritance would not have descended to the heir on the part of the mother.

No question was referred to the judges, whether, if by this conveyance a use had been limited, and not a trust, anything would have descended to the heir on the part of the mother. The law was clear and settled, that a use must ensue the nature of the land and retain the same quality; and whether the use resulted or was expressed, since the cases of *Abbot v. Burton* (a), *Godbolt v. Freestone* (b), and *Martin v. Strachan* (c), there is no difference.

*Rolle*, in his *Ab.* 2 vol. fo. 780, inserts this title, “*Uses al common Ley et Trusts ore*”, and then adds, shall ensue the nature of lands in descents, whether borough English, gavelkind, or of a seisin *ex parte paternâ*. And the technical reason seems to be a very plain one, that in such case the use is the old use that remained in the grantor (d).

The trust and use being essentially the same, I cannot but consider this as a trust descendible to the paternal heirs only; and that as it would not have descended to the heir *ex parte maternâ* had it been a use executed, the plaintiff *Burgess* can have no right or claim to the trust in this court, and therefore his bill must be dismissed, except as to the mill, &c.

My Lord Chief Justice was of this opinion when he gave on the first point his opinion for the crown, but he concluded that if the conveyance of 1718 operated so as

1759.

BURGESS  
v.

WHEATE.

The  
ATTORNEY-  
GENERAL

v.  
WHEATE.

[ \* 257 ]

(a) *Salk.* 590.

v. *Baldwere*, *ib.* 104.

(b) 3 *Lev.* 406.

(d) So an equity of re-

(c) *Stra.* 1179. 1 *Wils.* 66. demption. *Fawcett v. Low-*  
*ther*, 2 *Ves.* 300.

1759.

BURGESS

v.

WHEATE.

The

ATTORNEY-

GENERAL

v.

WHEATH.

The conveyance

of 1718 makes no alteration in the use, the operation of it in barring the escheat is by bringing a legal tenant to the land.

The escheat has no necessary, but only a casual dependence upon the old use, which may be determined, and no new one raised, and yet the lord have no claim to his escheat.

to bar the lord of his escheat, it gave a right to the heir *ex parte maternâ*; but, for my own part, I cannot possibly see any such consequence, for I conceive the conveyance makes no alteration in the use or trust, but that the operation of it in barring the escheat is by bringing a legal tenant to the land, which while the lord hath got, he retains his services, and can have no escheat in law or equity.

The escheat has no necessary, but only a casual, contingent, accidental dependence upon the old use; that use may be determined, and no new one raised, and yet the lord have no claim to his escheat. For instance, suppose Mrs. *Harding* had never executed this conveyance, but had been disseised, and the disseisor had died seised, or made a feoffment, and Mrs. *Harding* had died, as in fact she did, without heirs *ex parte paternâ*. The old use in Mrs. *Harding* would have been determined, yet the lord would have been no nearer the escheat than if she had left heirs.

Shall I be told, here is a new use acquired by the disseisor by operation of law which will bar the escheat? I would answer, and I think with a better grace, here may be a new use acquired by the trustee by operation of law and his own conveyance: he has as much an use as a disseisor. There is no variance made in the use by Mrs. *Harding*. She has made a tenant to the estate; that tenant, in my opinion, is a bar to the lord's claim. I am therefore also of opinion there is no alteration of this use.

The consequence is, that the heir *ex parte maternâ* cannot be entitled to any part of this estate, except the mill and closes under the deed of 1713; that as to all the rest, the original bill must be dismissed, and the information on the part of the crown dismissed totally.

s important case, which d the Bench, also caused difference of opinion in rofession. There is,

Mr. Coxe's MSS. in n's Inn Library, an eladiscussion of the argufrom the pen of Mr. erley, concluding in fa: the right of the crown, the maxim of *Equitas r legem*. He does not, r, advance any new ob: to the opposite opi- minded on the strict na- f escheats *ob defectum* r, and the want of in the crown to compel yance of the legal estate equence of the deter- m of the trust.

re adverting to *subse-* cases, it may not be er to notice the distinct . given by Lord Mac- l in *Peachy v. the Duke rset*, 1 *Stra.* 454, that rustee should die with- ; the lord would be en- by escheat, without object to the trust: the who is the legal tenant object, with regard to ate, to all the imbecili- that estate; if not, he d, by the means of a copyhold would be en-

tirely discharged from all those imperfections it labours under, and the lord's interest be taken away, *for the lord can take advantage of nobody's acts but those of his tenant.*

We may next remark, that Lord *Hardwicke*, in a case which occurred subsequent to his suggestion (*ante*, p. 181) of the necessity of making the *Attorney-General* a party to the suit, *Fawcett v. Lowther*, 2 *Ves.* 300, though he desired to be understood as giving no opinion upon the point, yet seems to have inclined against the escheat. He observes, " Though it is a considerable argument that otherwise there will be an end of escheats, because all the lands in *England* will soon be in trust, yet that is contrary to the old doctrine: it is contrary to the law before the statute of uses, when uses were mere trusts."

The *First* case in which the determination in *Burgess v. Wheate* came to be considered, was *Middleton v. Spicer*, 1 *Bro. C. C.* 201. It is generally thought (2 *Ves.* jun. 179) that the opinion of Lord *Thur-* low coincided with that of Lord *Mansfield*. But what- ever might have been his

1759.

BURGESS  
v.  
WHEATE.  
The  
ATTORNEY-  
GENERAL  
v.  
WHEATE.

1759.  
 ~~~~~  
 BURGESS
 v.
 WHEATE.
 The
 ATTORNEY-
 GENERAL
 v.
 WHEATE.
 [*260]

private opinion upon the point, the *decision*, at least in that case, does not in any degree affect the authority of *Burgess v. Wheate*. It relates to a different subject matter, and is founded *on entirely different principles. The question was one of *vacant possession*, and therefore a question of *prerogative*. In *Burgess v. Wheate*, it was a question of *tenure*; the claim of the crown being admitted on both sides to be “seigniorial, and not prerogative.”

The next case was *Walker v. Denne*, 2 *Ves.* jun. 170. Though *Burgess v. Wheate* was much relied upon by the counsel for the trustees, yet the two cases were entirely dissimilar. In that case a testator had directed money to be laid out in manors, lands, tenements, tithes, or hereditaments, or very long terms, with limitations applicable to real estate. The money not having been laid out, the crown was held, on failure of heirs, to have no equity to have it laid out on real estates in order to claim by escheat.

The next case was *Barclay v. Russell*, 3 *Ves.* 424, which

however, was also like *Middleton v. Spicer*, a case of vacant possession. Lord *Rosslyn* there remarked, without disapprobation, that the ground of the present decision was, there being a *terre-tenant*.

The next case, and the one which approaches the nearest to the present, is *Williams v. Lord Lonsdale*, 3 *Ves.* 752. That was a devise of copyhold (duly surrendered) to *A.* and his heirs in trust for *B.* and his heirs. *B.* died without heirs. Though it has since been determined, in the *King v. Coggan*, 6 *East*, 431, contrary to an opinion there expressed by Lord *Rosslyn*, that the Court of *K. B.* will compel a lord by mandamus to admit the heir of a trustee to enable him to try his title; yet that case has established, that, as between the lord and the heir of the trustee claiming to be admitted, a *court of equity* could not interpose. That a person having the legal estate, and only the legal estate, cannot come into equity for any purpose. His lordship considered that case as the converse of *Burgess v. Wheate*, which he relied upon as applying for the defendant—

ground of the de-
that case was, the
jurisdiction in the
he crown having no
subpœna : and upon
ground his lordship
the bill in that case.
ast case is *Hench-*
Attorney-General, 2
St. 498, in which
rine was much dis-
but which was de-
Middleton v. Spicer,
ound of prerogative
of escheat.
bove are the only
or judicial decisions
e at all connected
present case. It will
ved that none of
pugn its authority ;
some, if they do not
confirm it, yet have

tended very considerably to
recognise and countenance the
principles upon which the
Master of the *Rolls*, and the
Lord *Keeper*, founded their
opinions. It has, moreover,
been repeatedly stated in ar-
gument (2 *Ves. jun.* 174, 2
Sim. and St. 502.), that Lord
Mansfield's opinion has been
treated by the profession as
erroneous ; and it may be re-
marked that in the case of
Gordon v. Gordon, 3 *Swa.*
400, it was considered by the
parties, and seemed also to
have been the opinion of Lord
Eldon (*ib.* 470), that in the
event of a mortgagor dying
without heirs the mortgagee
would be entitled to hold.
Vide ante, p. 210. 256.

1759.
BURGESS
v.
WHEATE.
The
ATTORNEY-
GENERAL
v.
WHEATE.
[*261]

OAKELEY v. SMITH.

(*Reg. Lib. B.* 1758. *fol.* 112.) (a)

14th & 25th Nov.
1757.
14th Dec.
1758.
17th Jan. & 3d
Feb. 1759.
S. C.
Amb. 368.
Perryn, MSS.

BY *GRIFFITH BIGG* upon his marriage with Two tenants in
common in tail
copyhold estate (where the entail was barred by surrender) enter into an
agreement for a partition, and make cross surrenders of the parts allotted to each
: held, that they only barred a moiety of their respective estates, and that
agreement to divide cannot operate as a partition, particularly in the case of
holds, as it was without the lord's privity ; nor can a defendant, claiming
the entail, be compelled to substantiate the agreement.

he statement of facts decree *B.* 1757, fol. 81.
d under the original

1759.
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 OAKELEY  
 v.  
 SMITH.

*Lucy Lechmere*, 29th May, 1699, agreed to surrender the premises in question, being copyhold, to trustees to the use of himself for life; remainder to *Lucy*, the wife, for life for her jointure; remainder to his first and other sons in tail male; remainder to all the daughters of the marriage in tail; remainder to the heirs of his body; remainder to his brother, *Thomas Bigg*, in tail; remainder to his own right heirs. On the 20th June, 1699, a surrender was made to the above uses, except that instead of the limitation to all the daughters in tail, it was made by mistake to the eldest daughter in tail. The only son of the marriage dying without issue, it became necessary to rectify the settlement; and accordingly, 18th June, 1726, a decree was made that the daughters should have the benefit of the articles, and that a new surrender should be made, and a recovery to the uses in the articles.

[ 262 ]

On the 31st May, 1728, a recovery was suffered pursuant to the decree, which appeared to be the only instance of a recovery suffered of any premises within that manor; but by the custom, estates tail had been constantly barred by surrender (a).

*Henry Griffith Bigg* died, leaving issue by the defendant *Lucy* only two daughters: viz. *Sarah*, afterwards married to the defendant *Smith*, and *Lucy*, late wife of the plaintiff *Oakeley*.

The daughters, previous to their respective marriages, executed an agreement, bearing date the 27th of June, 1735, to divide the copyhold premises; and accordingly *Benthall* Farm, and other particular premises by name, were allotted to *Sarah*; and *Asterley* Farm, and other

(a) A custom to bar by surrender may subsist in the same manor concurrently with a custom to bar by recovery. *Everall v. Smalley*, Str. 1197. 1 Wils. 26. *Dox v. Truby*, Black. Rep. 944.



particular premises by name, to *Lucy*; and on the same day *Lucy* the mother, and *Lucy* the daughter, join in a surrender of *Benthall* moiety to the mother for life, remainder in fee to *Sarah* in fee. And by the same instrument the mother and *Sarah* join in a surrender of *Asterley* moiety to the use of the mother for life, remainder in fee to *Lucy* the daughter; and *Lucy* the mother was admitted to the whole for her life accordingly.

1759.  
OAKELEY  
v.  
SMITH.

By articles bearing date the 8th of *July*, 1735, executed previous to the marriage of the plaintiff with the said *Lucy Bigg*, it was covenanted that the reversion in fee of the said premises expectant upon the decease of the defendant *Lucy* the mother, and of which (as was thereby recited) a partition and surrender had been made, should, within three months after the said marriage, be settled to the use of the plaintiff and *Lucy* his said intended wife for life, and the life of the survivor; remainder to trustees for 500 years to raise portions for younger children; remainder to the first and other sons of the marriage in tail male, with several remainders over; remainder to the plaintiff in fee.

[ 263

The marriage took effect, and afterwards by an act of parliament, 20 *Geo.* 2. the reversion in fee, limited by the articles to the husband, was vested in the defendants *Walcot* and *Hill* in trust for such uses as *Lucy* the plaintiff's wife should by deed or will appoint.

*Lucy* by will, bearing date the 20th of *October*, 1749, devised this reversion to the plaintiff her husband for life, with a power for the plaintiff at any time by deed, sealed in the presence of two witnesses, to demise the premises, when in possession to raise £2000; and after the plaintiff's decease, and subject to the power, to her sister *Sarah* in fee.

By a codicil, bearing date the 15th of *June*, 1750, *Lucy* appoints the further sum of £1000 to be paid to

1759.  
 ~~~~~  
 OAKELEY
 v.
 SMITH.

the plaintiff her husband, charged on the said premises, within six months after her decease; and directed the said estates should be liable to the payment thereof.

This was a bill to have the two several sums of £2000 and £1000 raised for the plaintiff's benefit; and the only question in the case was, what interest the wife had in this estate at the time of making the will, or what part of the copyhold premises should be liable to the charge?

The cause came on to be heard on the 14th and 25th of November, 1757, before the *Master* of the *Rolls*, sitting for the Lord *Keeper*, when his Honour, after argument at the bar, delivered the following judgment.

The MASTER of the ROLLS.

[264] (After stating the facts very particularly.) On the part of the defendant it was insisted, that by the surrender of the mother and daughters of the 27th of June, 1735, by way of cross surrenders of each other's moiety, only a moiety of the estate tail was barred.

The daughters were then tenants in common of the estate tail, expectant on the mother's decease; and *Thomas Bigg* the uncle being dead, they were jointly seised of the reversion in fee. Now the daughters being tenants in common, ought to have joined with the mother in a surrender of the whole premises; for by the method which they adopted, one moiety of the premises was left unsurrendered by each of them (*a*). But Mr. *Solicitor-General* has insisted that by the agreement between the daughters in 1735, a partition of the premises was actually made; and then, by the cross surrenders of the respective moieties, the estate tail in the whole was effectually barred.

To consider the nature and effect of this agreement;

(*a*) See the case of *Church v. Edwards*, 2 Bro. C. C. 180.

and first, what would be the legal construction of it, supposing it the case of a freehold.

Tenants in coparcenary are at common law compellable to make partition, and so are now tenants in common, and joint tenants by statute. Now it is said, that though the law gives a compulsory method to make a partition, yet that parties may agree to do it voluntarily, and that such voluntary agreement for a partition will be carried into execution, even in a court of law, and for this purpose was cited *Lit.* sect. 243, and the following sections, where four methods of voluntary partitions are mentioned, and one compulsory method, viz. by writ. But that a court of law will execute such voluntary agreements, is so far from being there laid down, that I think *Littleton* says the direct contrary, sect. 243. One method of partition is, where they agree to make partition, and do make partition of the tenements;” so that they must not only agree, but partition must actually be made in consequence of it; and whenever the word *agreement* is used in the subsequent sections, it is made use of only as one species of partition in opposition to the compulsory method by writ; and there is nothing in *Littleton* but that such agreement must be afterwards executed by legal conveyances. And it is not to be wondered at, that no doctrine of this kind is to be found there, for Lord *Coke* was the last person in the world that would be for giving a legal effect to any thing equitable. And I think it might in this case as well have been contended that the articles in 1699 made a legal settlement, as that the agreement between the daughters made a partition.

But secondly, to consider the effect of this agreement in the case of a copyhold.

And here arises a stronger objection than if it had been the case of a freehold, because the agreement was without

1759.

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OAKELEY
v.
SMITH:

[265]

1759.
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 OAKBLEY  
 v.  
 SMITH.

the privity or intervention of the lord. In copyhold estates the dependency of the tenant upon the lord is always to be kept up. Many acts occasion a forfeiture by the lord's not being a party or privy to them, as an alienation by deed, &c.; whereas if a copyholder, tenant for life only, should surrender in fee, this would not be a forfeiture of a copyhold estate as it would of a freehold, because of the intervention of the lord who is a party to the act (a).

But it was said that this partition by the agreement would bind the lord, and that it affects only the possession of the estate, and the lord is not prejudiced. Certainly it changes the nature of the tenure. The lord could not have been barred by this act *in pais*, supposing there had been an escheat, nor to have accepted a moiety of the quit rent. Nothing can be done without the intervention of the lord.

[ 266 ]

But further, this agreement was merely executory, eventual, and contingent, and the parties themselves were far from designing or considering the agreement itself as a complete partition, which had reference to the surrender, and was made to execute and effectuate the agreement the very same day. I am therefore of opinion, that the power which the plaintiff's wife executed will operate only on one-fourth of these copyhold premises; viz. one moiety of the moiety surrendered to her.

As to the other point that was made, viz. whether, if the surrender was defective, so as not to bar the whole estate tail, a court of equity would not (as the plaintiff had, in consideration of the marriage, and his wife's portion, settled an estate of his own of £1000 *per annum* on the issue of the marriage) compel the defendant to substantiate the articles of 1735? It is very clear that

(a) *Vide the King v. Haddenham*, 15 East, 463.

equity will not interpose; the defendant claiming under the entail *per formam doni*, and paramount the daughters, cannot be affected by any agreement or transaction between them.

1759.  
OAKELEY  
v.  
SMITH.

This was a rehearing from the above decree.

The *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Cormyn*, for the plaintiffs, urged the same arguments as those alluded to in the above judgment, and also cited *Docton v. Priest*, *Cro. Elis.* 95. *Ross v. Ross*, 1 Ch. Ca. 171.

The *Attorney-General* and Mr. *de Grey* for the defendants.

*The Lord KEEPER.*

Here are two matters for the consideration of the court: first, what was the effect of the several surrenders in barring the estate tail; and secondly, as to the equity upon the agreement. 3d February.

As to the first point. The surrenders, in order to bar the estate tail, must surrender the entire estate, that a new estate may arise on the admission of the lord. A recovery can in that manner only be effected at common law. If one tenant in common comes in by voucher, it will bar only a moiety. If both, by distinct deeds, grant severally a moiety to the tenant to the præcipe, and the recovery is suffered, it will bar the estate tail in a moiety only.

[ 267 ]

It was contended at the bar that the agreement operated as a partition of the copyhold, and that it is the same in this case as if it had been the case of a freehold, where a partition in writing, without words of conveyance, would have been a good partition. But in my opinion, even if that point had been established in the case of a freehold, it does not therefore follow that it

1759.

OAKELEY  
v.  
SMITH.

would be the same in the case of a copyhold. It is only an agreement to divide, not an actual partition: afterwards each surrenders only a moiety of a moiety. Neither had power over more; it cannot therefore operate as a surrender of the whole.

The second point is too clear to have any doubt upon it whatever.

Decree affirmed.

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*Vide Ireland v. Rittle*, 1 2 *Atk.* 452. *May v. Hook*,  
*Atk.* 541. *Oldham v. Hughes*, *Harg. Co. Lit.* 246. n. 1.

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1759.

24th February &  
1st March.

S. C.

*Cit. 1 Cox*, 17.

Devise held to be void, being proved to be upon a secret trust for a charity; conveyances having been made by the devisees, and the trust declared, though they denied, by their answer, having made any promise.

[ \*268 ]

EDWARDS v. PIKE.

(*Reg. Lib. A.* 1758. *fol.* 414.)

THIS was a bill brought by the heir at law of *Frances Markes*, to have a reconveyance of certain premises from the corporation of *New Sarum*, who were grantees of the devisees under her will, on the ground of the devise being void by the statute of mortmain.

\* The testatrix, who resided at *Salisbury*, had, during her lifetime, placed poor persons in some houses which she possessed in that city, and being desirous that they should continue there after her death, she, by a will, bearing date the 3d of *February*, 1729, among other things, devised those premises to trustees for the residence of the poor and impotent persons of the parish. But being apprehensive that the devise might be void by the statute of mortmain, she frequently, in the course of the years 1750 and 1751, consulted Mr. *Bingham*, a barrister, in what manner she might defeat the statute, who told her that she might do so by devising upon a secret trust. Accordingly, in the months of *July* and *August*, 1750;

executed a will and two codicils, by which she made her disposition of her property, with the exception of the houses.

In a third codicil, bearing date the 9th of *May* 1751, she devised these premises to her two nieces, the defendants *Mary Pike*, and *Catherine* (afterwards the wife of the defendant *John Tatum*), to hold the same to and to the heirs of the said defendants *Mary* and *Catherine*, and their heirs and assigns for ever.

At the execution of this codicil she called up into court the defendants, her two nieces, who stated by their answers, that they found there, on coming in, two persons of the name of *Richard Wykes* and *William Wykes* (both of whom were examined by the plaintiffs). *Wykes* then read to them a memorandum purporting that testatrix had devised the premises to them and their heirs; that testatrix informed them of her intention and entreated them to promise, in the presence of two persons, that they would immediately upon her death convey the premises to the mayor and commonalty of *Sarum*, and their successors for ever, upon trust, that they should from time to time place such poor persons as the said messuages as to them should seem meet.

It was proved that *Mary* promised to do whatever her co-niece thought proper, and that the other niece remained silent, though they both denied by their answers that they had made any promise to convey. The bill charged that this was an elusory disposition, in order to evade the statute against mortmain.

The testatrix died on the 27th of *December*, 1753. By a deed of bargain and sale, bearing date the 26th of *June*, 1754, the said premises were conveyed by the defendants *Mary* and *Catherine Pike*, to the said mayor and commonalty and their successors for ever; and by an indenture of the same date made between the said mayor

1759.

EDWARDS

v.

PIKE.

[ 269 ]

1759.  
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 EDWARDS
 v.
 PIKE.

and commonalty of the one part, and the said *Mary* and *Catherine Pike* of the other, reciting, that in pursuance of a promise which they had made to their late aunt, they had, by an indenture of even date, conveyed the said premises to the said mayor and commonalty; it was declared that the premises were conveyed upon the trusts mentioned in the memorandum.

The *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Holkins*, for the plaintiff.

The *Attorney-General* and Mr. *Perrot* for the corporation; and Mr. *Sewell* and Mr. *Browning* for the nieces, insisted that it was no trust, but a voluntary donation of the nieces; that the devise to them could not, according to the statute of frauds, be controlled or revoked but by some act executed with equal solemnity.

The Lord KEEPER,

However, was of opinion that the nieces took the estate on a promise, and declared the devise void, and decreed a reconveyance.

Vide Boson v. Statham, post. 508, and the cases cited in the note there.

[270]

EARL of DARLINGTON v. BOWES,

Et è contra.

1759.
 2d March.
 S. C.
 cit. 1 *Burr.* 253.


EARL of DARLINGTON v. BOWES.

(*Reg. Lib. A. 1758. fol. 214.*)

New trials granted in issues directed to try the right of the soil, though the judge certified in favour of the verdict; as there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only.

By orders made at the hearing in the two former of these causes on the 5th of *May* 1755, in the last on the

20th of *February* 1755, issues had been directed to be tried at the then next assizes for the county of *Durham*, whether the commons, &c. within the boundaries therein mentioned, or any and what part thereof, were the soil and freehold of the plaintiff or the defendant.

1759.

 Earl of
 DARLINGTON
 v.
 BOWES.

These issues had been thrice carried down to be tried at *Durham*, and (the regulations of the court of *King's Bench*, as to views, having not yet been made (a)), they were twice put off by the defendant upon objections on account of the view; and the third time a view having been granted by consent upon terms, the trial was prevented from taking place by an accident which happened to the Judge. The defendant moved in *Trinity Term*, 1758, for a view, but refused to renew his former consent, or to come into any terms, insisting that by law he was entitled to a view of course. The plaintiff had likewise moved for a view consenting to terms. Both motions were adjourned to the last day of *Trinity Term*, 1758, when the court, upon all the circumstances, rejected the defendant's motion, unless he consented within a week to the terms proposed, which he refused (b).

The issues came on to be tried at the last summer assizes at *Durham* before Mr. Baron *Smythe*, when, in the former, a verdict was found for the plaintiff by default; in the second, which was tried, there was a verdict also for the plaintiff.

[271]

The learned judge certified, that he was satisfied with the verdict, and also "that a view was perfectly unnecessary, there being no dispute concerning the locality, discrimination, or limits of the premises, but merely a question to whom certain lands belonged" (c).

(a) They were made in
Hilary Term, 30 *Geo. 2.* Vide
 1 *Burr.* 253.

(b) 1 *Burr.* 2.
 (c) 1 *Burr.* 256.

1759.

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 Earl of  
 DARLINGTON  
 v.  
 BOWES.

The defendant now moved for new trials, on the ground, First, Of having been injured for want of a view being taken of the premises, there being several buildings, inclosures, and other remains of acts of ownership done by him and his ancestors on the place in question, which could not properly be applied in the trial for want of a view by the jury; and, Secondly, because it was necessary to have another verdict before the inheritance was bound; it being a rule in this court never to bind the inheritance upon one verdict, and there being several instances of three or four new trials being granted in such cases.

The *Attorney-General*, Mr. Perrot, and Mr. Wilbraham, in support of the motion.

The *Solicitor-General*, Mr. Norton, and Mr. Hoskins, *contra*.

*The Lord KEEPER*

Expressed great disapprobation of suits of this nature (a), and inquired if there was any instance of a decree, where the inheritance would be absolutely bound, being made upon one verdict only (b), observing that he

(a) *Vide Wake v. Conyers*, Bro. P. C. Ed. Toml. 378. *Barefoot v. Fry*, Bunb. 158. *post.* 331.

(b) It has frequently been said, that a decree ought not to be made to bind the inheritance, where there has been but one trial at law. *Fitton v. Lord Macclesfield*, 1 Vern. 292. *Edwin v. Thomas*, 2 Vern. 75. *Earl of Bath v. Sherwin*, Prec. Can. 261. *Gilb. Rep.* 2. *Leighton v. Leighton*, 1 P. W. 674. 1 *Stra.* 404. 4 *Bro. P. C. Ed. Toml.* 378. *Barefoot v. Fry*, Bunb. 158. *Dalton v. Dalton*, Sel. Ca. temp. King, 13. *Lord Falconberg v. Pierce*, Amb. 210. and cit. 4 *Ves.* 206, where four trials were granted. In *Lord Sherborne v. Naper*, cit. ib. 2 *Ridg. P. C.* 224. *Bates v. Graves*, 2 *Ves. jun.* 287., after three ejectments, an issue was directed upon the same point; a new trial was

ht there were some old ones (*a*), and that if any  
be found, he would certainly refuse the present  
a: but none having been produced, the motion was  
ad.

lordship also approved the denying a view, unless  
defendant renewed his consent; and made it part of  
order for a new trial, that he should consent to the  
(*b*).

e issues were afterwards tried before Mr. Justice  
*first*, when verdicts were again found for the plain-  
The defendant again moved for new trials, which  
refused, and a decree (*June 14, 1760*), was made for  
plaintiff according to the verdicts (*Reg. Lib. A. 1759,*  
25) (*c*).

ards granted on appeal  
*House of Lords*; and  
that another ejectment  
ried, 2 *Ridg. Cases in*  
ment in *Ireland*, 224.  
*Swinerton v. Marquis*  
*fford*, 3 *Taunt.* 91.

Lord Clarendon's de-  
a *Fitton v. Lord Mac-*  
ld appears to have been  
upon one trial only;  
ere is a loose note of a  
f the name of *Wilson v.*  
14 *Vin. Ab.* 431, which  
to countenance this.  
also *Lowe v. Jolliffe*, 1  
383. *Eden on Injunc-*  
355.

See *Tidd's Practice*,

“There is a difference  
en issues at common

.. I.

law, and issues directed by  
this court; because the intent  
of it here is only *to inform the*  
*conscience of the court*, and  
therefore not tied down to the  
same strictness and regard for  
verdicts as courts of common  
law,” *per Lord Hardwicke,*  
*Richards v. Symes*, 2 *Atk.* 319.  
*et vide Baker v. Hart*, 1 *Ves.*  
28. 3 *Atk.* 542. *Stace v. Mab-*  
*bot*, 2 *Ves.* 552. *Standen v.*  
*Standen*, 1 *Ves.* jun. 134.  
*O'Connor v. Cook*, 6 *Ves.* 665.  
8 *Ves.* 535. *The Warden and*  
*Minor Canons of St. Paul's v.*  
*Morris*, 9 *Ves.* 155. *Bullen v.*  
*Mitchell*, 2 *Price*, 399., affirm-  
ed in *D. P.* 4 *Dow.* 297. *Pem-*  
*berton v. Pemberton*, 11 *Ves.*  
50. *Hampson v. Hampson*, 3  
*Ves. and Be.* 41.

1759.  
Earl of  
DARLINGTON  
v.  
BOWES.

[ 273 ]

1759.  
3d & 5th March.  
S. C.  
Amb. 371.

## MOORE v. BATTIE.

(Reg. Lib. Min. App. 1758, 1759.) (a)

*A.* agrees to lend *B.* 1000*l.*, and for that purpose sells 1000*l.* stock, which, being under *par*, produces only 923*l.*: he afterwards lends a further sum, 1400*l.* part of which being sold out in like manner, produces only 1132*l.* 5*s.*, and takes mortgages for the two sums at 5 *per cent.*; in the former case, with a covenant to reduce the interest to 4 *per cent.* if paid within one year, in the latter case, with a power to the borrower to replace the stock within two years. On a bill brought by *A.* for a foreclosure, the whole money having been allowed in the account by the Master, held, the transaction was usurious, and that equity would relieve, though the money had been paid.

[ \*274 ]

By indenture, bearing date the 24th of *March*, 1743, the plaintiff had mortgaged certain premises to the defendant, Dr. *Battie*, to secure the sum of £11,000 at 5 *per cent.*


The plaintiff having occasion for the further sum of £1000, the defendant agreed to advance it to him; and accordingly sold out £1000 *South Sea* annuities, which were then at a discount of £76 upon the whole sum, and paying to the plaintiff £924, the sum for which they sold. By a deed poll, bearing date the 1st of *July*, 1744, the plaintiff charged the premises with a further sum of £1000, with interest at 5 *per cent.* with a covenant to reduce the interest to 4 *per cent.* if paid within one year.

The plaintiff afterwards applying for the loan of a further sum of £2100, the defendant, in order to complete it, sold out £1400 *South Sea* annuities, which being under *par* sold at a loss of £267 15*s.* and paying to the plaintiff the sum of £1132 5*s.* By a deed poll, \* bearing date the 17th of *September*, 1747, the premises were charged with the further sum of £2100 at 5 *per cent.* interest, with a power to the plaintiff to reinstate the £1400 *South Sea* annuities at any time within two years, which was never done.

The defendant, Dr. *Battie*, having brought a bill to foreclose, and the plaintiff in his answer having admitted the mortgages, and submitted to pay what was due; the

(a) There is no entry in the Register's book of this case.

Master, in taking the account, considered these sums advanced as £1000 and £1400 respectively, and computed interest upon them accordingly, and made his report. The plaintiff having paid the several sums, together with the principal, interest, and costs reported, now brought the present bill to be repaid the several sums of £76 and £267 15s. and interest; insisting that he ought not to have been charged with them in the account.

1759.  
  
 MOORE  
 v.  
 BATTIE.

The defendant pleaded in bar the proceedings under the decree. The plea coming on to be argued on the 17th of *January*, 1756, before Lord *Hardwicke*, C., it was ordered to stand for an answer, with liberty for the plaintiff to except (a).

Two questions were now made on the argument: First, Whether the transaction was usurious; Secondly, Whether, the money having been paid, equity would relieve.

The *Solicitor-General* and Mr. *Wilbraham* for the plaintiff.

The *Attorney-General*, Mr. *Sewell*, and Mr. *Thurlow*, for the defendant.

*The Lord KEEPER.*

Upon the first point, I am clearly of opinion that this is a shift within the statute of usury. The plaintiff had but £924 instead of £1000 in the one case, and £1132 5s. instead of £1400 in the other. He has paid as much interest as is equal to 5 *per cent.* for £1000 and £1400, which is more than the statute allows; for it is more than 5 *per cent.* for the money he actually received. Suppose stocks at 75: if a person takes at *par* he pays £6 5s. *per cent.* The case of the £1400 is not distinguishable

[ 275 ]

(a) *Reg. Lib.* B. 1755, fol. 323.

1759.  
 ~~~~~  
 MOORE
 v.
 BATTIE.

from the other. It is not on the footing of a risk, for defendant took interest for £1400, though, in fact, the plaintiff received but £1132 5s.

As to the second point, equity will relieve after the money is paid; the law cannot. This matter was not in question in the former cause. The plaintiff might indeed have brought a cross bill, but he did not: there has therefore been no determination on this question. He complains of being injured in the account.

It must therefore be referred to the Master to compute interest upon the two several sums of £1000 and £2100, of which the said two first-mentioned sums were part. Interest to be paid on the sum of £76 from the 1st of *July*, 1744, and on the sum of £267 15s. from the 17th of *September*, 1747: and what shall be owing on the said account shall be added to the said £76 and £267 15s., and paid to the plaintiff by the defendant.

[* 276]

A mere loan of stock is not usurious, nor the payment of the dividends in the interim, even though they exceed the legal rate of interest. *Tate v. Wellings*, 3 T. R. 531. *Pike v. Ledwell*, 5 Esp. N.P.C. 164. *Forrest v. Elwes*, 4 Ves. 492. *Maddock v. Rumball*, 8 East, 304. *Clark v. Giraud*, 1 Mad. 511.

The above case of *Tate v. Wellings* may appear, at first sight, to contradict the present, but there is, in fact, a clear distinction between them. In *Tate v. Wellings*, the agreement was, that the defendant

should have the use of the money which was the produce of the stock, paying the same interest which the stock would have produced, with liberty *to replace on a certain day; but if it were not replaced by that time, the lender was to be repaid *the sum advanced*. Whereas in the present case the agreement was, in the second of the loans in question, that if the stock were not replaced by the stipulated time, the lender should be repaid a *greater sum* than that which was actually advanced. From which circumstance the Lord

Keeper drew an inference, which the jury had negatived in the former case, that the transaction was colourable.

In *Barnard v. Young*, 17 *Ves.* 44, the contract was for repayment, with legal interest, or, at the option of the creditor, to transfer so much

stock as it would have produced on the day it was payable: which was held usurious, the principal and interest being secured with the chance of a rise of the stock: not therefore like a contract to replace stock which might fall.

1759.
MOORE
v.
BATTIE.

1758.
11th, 12th, and
13th December.
1759.
25th and 26th
January, and
14th March.
S. C.
3 *Gw.* 1177.
Amb. MSS.

FANSHAW v. ROTHERAM.

(*Reg. Lib. A.* 1758. fol. 264.)

THIS was a bill brought by the impropiator of the rectory of *Dronfield*, in the county of *Derby*, for an account (amongst other things) of the tithes of hay and clover within the township of *Dronfield* and the hamlet of *Stubley*.

Queen *Elizabeth*, by letters patent, bearing date the 9th of *February*, 1588, granted to *Edmund Downing*, and *Miles Doding*, and their heirs, the rectory of the church of *Dronfield*, and all tithes arising in *Dronfield* and *Holmsfield*, in the said parish of *Dronfield*.

By indentures, bearing date the 10th of *February*, 1588, the said *Edmund Downing* and *Miles Doding* conveyed the same to *Thomas* and *Henry Fanshaw*, and their heirs.

James the First, by letters patent, bearing date the 24th of *March*, 1613, granted to *Henry Fanshaw*, and his heirs, all the rectory and church of *Dronfield*, together with its rights, members, and appurtenances; and (amongst other things) all the tithes of hay in the hamlet of *Stubley*, parcel of the said rectory of *Dron-*

There cannot be prescription in *non decimando* against a lay impropiator; but it is not necessary to produce the deed of severance, it is sufficient to shew that it existed: where defendant, and those under whom he claimed, had been upwards of 130 years in the *pernancy* of the tithes, a bill by impropiator was dismissed.

1759.

FANSHAW
 v.
 ROTHERAM.

field, and excepting the Grange of *Dronfield*, and the tithes of corn and hay in *Dronfield* and *Holmsfield*.

The defendant, by his answer, insisted that the tithes of hay and clover arising from such part of the lands as lie in the township of *Dronfield* and hamlet of *Stubley* were formerly severed from the said rectory, and that his father was in his lifetime seised in fee simple of the tithes of hay and clover arising on such of the said lands as were his own estate and inheritance, by virtue of several conveyances made to him and to *John Rotheram* his father: and with respect to the residue of the lands, which were in the defendant's father's occupation, and were the estate and inheritance of other persons who held the same, that the owners of such lands were respectively seised in fee of the tithes of hay and clover arising from the same by virtue of several conveyances made to them respectively: and that defendant believed that the said tithes were severed from the said rectory by the plaintiff's ancestors, or the persons under whom they claim above 130 years ago.

On the part of the defendant the following evidence was given of the tithes in question having been made the subject of conveyance by those under whom he claimed. An indenture, bearing date the 28th of *October*, 1725, between *Thomas Hunloke* and *Edward Drabbles*, of the one part, and *William Viscount Mansfield*, of the other: an indenture, bearing date the 18th of *June*, 1628, between *Frances Hunloke*, widow, of the one part, and *Jeremy Ward*, *William Maplesden*, and *Æneas Drabbles* of the other: an indenture of bargain and sale, bearing date the 18th of *June*, 1628, signed *Frances Hunloke*: a copy of a recovery suffered in *Trinity Term*, 1628, wherein *Jeremy Ward* was demandant, *William Maplesden* and *Æneas Drabbles*, tenants, and *Francis*

Humloke, vouchee: an indenture bearing date the 20th of *October*, 1633, between *George Stainrode* and *Gervase Stainrode* of the one part, and *Michael Burton* of the other: an indenture, bearing date the 23d of *May*, 1693, between *Lionel Revel* of the one part, and *John Rotheram* the younger, of the other: a receipt signed *Lionel Revel*, dated the 19th day of *June*, 1693: an indenture, bearing date the 31st of *January*, 1694, made between *Thomas Burton*, of the one part, and *John Rotheram*, jun. of the other: an indenture, bearing date the 26th of *October*, 1731, made between *Thomas Burton* of the one part, and *Samuel Rotherham* of the other.

1759.
FANSHAW
v.
ROTHERAM.

The defendant examined witnesses to prove that the tithe of hay had been enjoyed by himself and his ancestors ever since the above purchase by *John Rotheram*, who was his grandfather, and by *Burton* before him. That no tithe of hay had ever been set out in *Dronfield* and *Stubley*, or any *modus* or composition paid. One witness deposed, that he had heard that *Burton* had taken up the tithes, and let them.

The cause came on for hearing on the 12th of *July*, 1758; but as it appeared upon the opening of the *Attorney-General* for the plaintiff, that the point had lately been determined in the *Exchequer*, in the case of *Jennings v. Lettis* (a); which determination was not acquiesced in; and counsel not being prepared to argue, the cause was directed to stand over till *Michaelmas*

(a) This cause came on 1755), *Gr.* 952. The intention of proceeding to the first in *December*, 1752, when the court (*absente Legge*, B.) decreed an account, 2 *Wood*, 431, upon a rehearing, that decree was affirmed (*Trin.* *House of Lords* was abandoned in consequence of an opinion of Mr. *Yorke*.)

1759.

FANSHAW

v.

ROTHERAM.

[*279]

Term ; and it now coming on again, the court directed the counsel for the defendant to begin.

* The *Solicitor-General*, Mr. *Wilbraham*, and Sir *Anthony Abdy*, for the defendant (a).

The defence in the present case is upon a title, and not a *non decimando*. The question is not upon the subtraction of the tithes, but who has a right to them ; and we submit that this case shews a right in the defendant to the tithes in question. But abstracted from the title, it may be material to consider the general point, whether in the case of a lay impropriator a defendant can say, in bar of a demand of tithes, that no tithes have ever been paid or demanded for his lands.

It is quite clear that it would not be good against a spiritual person ; but the maxims and principles of the common law with respect to spiritual persons cannot apply to lay impropriators. Very great privileges were extended to the former in favour of religion. “ And the law,” says Lord *Coke*, “ had great policy therein, for the decay of revenue of men of holy church in the end will be the overthrow of the service of God and his religion.” Bp. of *Winchester’s* case (b). For this reason extraordinary strictness was attached to their alienations: bishops could not alien without the consent of their chapters, or rectors without the consent of their patron and ordinary. Bishops were considered as seised solely *ad meliorationem ecclesiæ* : it was not till the 26 *Hen. 8.* that they were liable to forfeiture, and that was afterwards restrained by 2 *Ed. 6.* to their own estates. The statute of limitations, and the rules of the common law with respect to bar, did not operate against them. In matters of evidence, entries by a deceased rector were ad-

(a) This is chiefly taken from very elaborate argument.
a copy of Mr. *Wilbraham’s* (b) 2 Co. 38.

mitted as evidence in favour of his successor (a). The reason given by Lord Coke in the above cited case, why a layman could not prescribe against a spiritual person fails in the case of a lay impropriator, viz. that if such a prescription should hold in the case of a spiritual person, a jury of laymen would not be equal in the trial of it.

It is true that it has been determined in several cases, that a layman cannot prescribe in *non decimando* against a lay impropriator. Bp. of Winchester's case. *Slade v. Drake* (b). Corporation of *Bury v. Evans* (c). *Shelly v. Penniford*, 21st February, 1707. *Fanshaw v. More* (d), Trin. 1743. But several of these were determined with very great doubt. In *Bury v. Evans*, Mr. Baron Parker appeared at first to have been against the resolution. In *Fanshaw v. More*, Mr. Baron Clarke says, "I know no case that deserves more consideration than this kind of question; because, though there are great authorities that a layman cannot prescribe in *non decimando*, yet the reason of the thing grows weaker every day." In *Benson v. Olive* (e) the court was divided in opinion. And from the late determination in *Jennings v. Lettis*,

1759.
FANSHAW
v.
ROTHERAM.

(a) Upon the ground, as it is said, that the parson having no interest beyond his life, it is not to be presumed that he would make false entries for his successor. 2 Ves. 43. 7 East, 290. *Armstrong v. Jewitt*, 4 Price, 218. Upon which principle entries by a monastery of their own rights have been rejected. *Per Lawrence, J., Staff. Lent Ass.* 1810. *Vide Swinnerton v. Marq. of*

Stafford, 3 Taunt. 91. But the admission of similar entries has been extended to impropriators. *Anon. Bunb.* 46. *Woodnoth v. Lord Cobham*, Bunb. 180. *Gw.* 653. *Illingworth v. Leigh*, *Ib.* 1618. *Perigal v. Nicholson*, *Wightw.* 63.

(b) *Hob.* 296. *Gw.* 385.

(c) *Com. Rep.* 643. *Gw.* 757.

(d) *Gw.* 780.

(e) *Bunb.* 284. *Gw.* 701.

1759.

FANSHAW
v.
ROTHERAM.

there is an appeal, and it is *adhuc sub judice*. There are many resolutions which have stood longer than this has done; and yet when the inconveniences of them have been explained and understood, they have been set aside.

The importance of this case is very great, as it appears in *Cowel*, title Impropriations, that there are 3845 impropriations in *England*; and it is certain that the tithes of all or many of them may be severed. But if the deeds of severance are lost, must the right be lost too? No man can preserve his title deeds for ever: and it would be contrary to all rules of law to say that the original title shall be produced, and yet that the loss of it cannot be supplied by any other evidence. This would be constituting a new species of inheritances, *quamdū* the title deeds existed. Suppose a lay impropriator should, by deeds, for a valuable consideration, discharge all the tenants in the rectory from the payment of tithes, is it just or reasonable that 500 years hence, when time has destroyed the deeds, that he will have a right to resume and demand the tithes? But if the determination in *Bury v. Evans* should prevail, the right to the rectory might be set up at any time, upon the unjust supposition of his right to take advantage of the deeds of discharge being lost.

It is said in *Cowel*, title Rectory, that *Rectoria* signifies an entire parish church, with all its rights, glebes, tithes, and other profits whatsoever. And *Spelman*, under the word *Rectoria*, says it is often used for the rector's manse or parsonage-house; but these definitions in no way belong to a lay impropriation, which is a mere temporal right; and the associating ideas of it, which belong only to rectories in spiritual persons, seems to be the ground on which the resolutions in *Bury v. Evans*, and *Fanshaw v. More*, proceeded; but if these ideas are separated, and none are annexed but what properly belong to a lay

impropriation, it seems to destroy all the foundation upon which those cases depend. In *Fisher v. Cook, Michaelmas*, 12 Geo. 1. it was said by *Gilbert*, C. B., that the rule of the canonists, that there can be no *non decimando* by a layman, is founded on two reasons: First, That the clergy have a divine right to tithes, a reason which is now indeed exploded; but, Secondly, That the parson, being tenant for life, may live longer than any of his parish, and so by his neglect, &c.; if it were to prevail, the very support of the church would be destroyed; but it is plain that neither of these reasons can affect the present case.

It may be said that no prescription can be set up in this case for the defendant; because as tithes became temporal inheritances upon or after the dissolution of the monasteries, which being within time of memory, no prescription can arise concerning them. But this argument does not hold, because, though as *Mr. Selden* and *Lord Coke* observe, a layman was incapable of taking a grant of the pernaney of tithes before the dissolution of the monasteries; yet it may be proved from the same authorities and otherwise, that he might take a discharge from tithes out of his own lands in way of retainer. *Wright v. Wright*, *Cro. Eliz.* 512. *Bishop of Winchester's case*, 2 Co. 44 a. And *non constat* but that there might be such old grant by the parson, patron, and ordinary, to discharge the lands in question from the payment of tithes.

But supposing the cases of the *Corporation of Bury v. Evans*, and *Fanshaw v. More*, to stand in their full force, yet being different from the present case, they ought not to control it. In both those cases the defence was merely upon the nonpayment, and nothing else. It was a pure *non decimando*: the present case amounts to a title.

1759.
FANSHAW
v.
ROTHERAM.

1759.

FANSHAW
v.
ROTHERAM.

The first statute for the dissolution of monasteries was the 27 *H. 8. c. 28.* which gave all the lesser monasteries, not exceeding £200 *per annum*, to the king. The next statute was 31 *H. 8. c. 13.* which gave the possessions of the greater monasteries to the king, discharged of tithes, as held by the abbot and priors. Great part of the property of the kingdom being thus changed and altered, it became necessary for the legislature to interpose, in order to settle this new kind of property; and therefore the 32 *H. 8. c. 7.* provides that the like privileges and remedies should be had upon these estates as the law gives to other temporal inheritances. In *Watson's Clergyman's Law*, c. 53. p. 581, it is said that tithes and other ecclesiastical duties that came to the crown by the statutes 27 *H. 8.* 31 *H. 8.* 37 *H. 8.* and 1 *E. 6.* are by those statutes, and this of 32 *H. 8.* and 1 and 2 *Ph. and M.* in the lands of laymen, temporal inheritances, and shall be accounted assets; and husbands shall be tenants by the curtesy, and wives endowed of them; and shall have other incidents belonging to temporal inheritances; only that they retain the ecclesiastical quality, that the owner may sue for the same in the ecclesiastical court. 1 *Co. Lit.* 159. In 1 *Ro. Abr.* 653, it is said that a layman cannot prescribe in *non decimando* without special matter, which plainly implies, that with special matter he may prescribe: and the book says that he is capable of a discharge of tithe even from the church. In the present case the special matter assigned are the deeds and recovery, all evidences of a title, as well as the long uninterrupted enjoyment without any demand of tithes being made. In Sir *Simon Degge's Parson's Councillor*, pt. 2. c. 2. it is said, that there were infeudations of tithes before the parochial tithes were settled, which is, without dispute, both in *England* and in other kingdoms. And having cited these words from *Linwood*, "*Bene*

potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ dare ante Concilium Lateranense, non tamen post," the book, a little after, goes on thus; But notwithstanding this constitution, many of the abbots held out against the parish priests, who durst not or were not able to contest them, and after claiming the tithes by prescription, that is, by forty years' possession, which is a prescription allowed by the ecclesiastical courts, and that is the reason that many portions of tithes are at this day held by impropriators that had been gained by the abbots by such prescriptions, and not by their original grants, and by this means they got their prescription *de non decimando*, for the canon law does allow one clergyman to prescribe against another; but not a layman by any means, to the prejudice of the church. Considering therefore the present claim as a temporal inheritance, it is clearly barred by the title and possession set up; and, considered as an ecclesiastical estate, it is barred by the prescription of forty years.

Let us next consider the effect of the evidence which we have given in the present case. It is sufficiently clear that the tithes have never been paid to the impropriator, and that they have always been let or taken by the owner of the premises. Such a title would be clearly good as to land, where the courts have carried the doctrine of presumption to a very liberal extent. *Omnia presumantur rite esse acta*. Presumption is the evidence of things not seen; where, from an apparent effect, you may infer a probable cause. We cannot produce any release or grant of the tithes in question, yet what is produced is such evidence of title as that a court ought to presume it. To suppose the contrary, must be to suppose that one family has for many ages together encroached upon and retained the property of the other, which has sat by without preferring its claim. In a bill brought for a rent,

1759.

FANSHAW

v.

ROTHERAM.

1759.

~
FANSHAW
 v.
ROTHBRAM.

equity will not establish it if it is not brought in a reasonable compass of time. Length of time presumes a release, or, what is equivalent, a grant to the owner of the land. An ancient deed proves itself from presumption; a lease will be presumed from an old release. In ancient recoveries, a good tenant to the præcipe has always been presumed. In Sir *Francis North's* argument in *Potter v. North*, 1 Vent. 187, it is said, ancient grants happened to be lost many times, and it would be hard that no title could be made to things that lie in grant, but by shewing of a grant: therefore upon usage, time does not run, and the law presumes a grant, and a lawful beginning, and allows such usage for a good title. And another case was cited of Lord *Stafford v. Llewellyn*, Skin. 77, where lands were conveyed to trustees upon trust, amongst other things, to settle on Lord *Stafford* for life, with power of leasing. Lord *Stafford* made several leases, but it not appearing that the trustees had made the settlement, the question was, whether the leases were good, and there having been a long possession under them, the court said, they would presume that my lord had some conveyance from the trustees, to enable him to make the leases; and here one *Farrer's* case was cited, which was in *C. B.*, where *Farrer* made a title from the Black Prince, which could not be out of him but by an act of parliament; but yet, for that the possession had gone otherwise ever since, the court presumed that there had been such an act, though not now to be found.

The reason why courts of equity interpose in cases of this kind is, in respect of the account prayed. It is therefore wholly in the discretion of the court to give relief or not. And here it seems most reasonable that the court should not interpose till the right is established. This is a mere legal right, and no equity whatever

except the account. In the cases of *Medley v. Talmey*, and the *Mayor, Aldermen, and Burgesses of Warwick v. Lucas*, cited *Com. Rep.* 652, 653, the Court of *Exchequer* dismissed the bills, unless a trial at law was first had; and in *Fanshaw v. Jordan* in the *Exchequer*, the court also refused to interfere. If we have made out a right, the court must dismiss the bill.

The plaintiff's remedy is at law therefore, and that it is so may be proved from several cases. In *Harpur's case* 11 *Co.* 25 *b.* it was agreed that an ejectment would lie for tithes, though there was an objection in that case on account of the uncertainty. In *Priest v. Wood*, *Cro. Car.* 301, it was expressly held, that an ejectment lies for tithes only. In *Heynes v. Stroud*, *O'Bend.* 148, held, that an ejectment would lie either for a rectory or a portion of tithes; but that there was a difference between a rectory and a portion of tithes, for the portion ought to be demanded as such. So also in *Camell v. Clavering*, *Raym.* 789, it was held that an ejectment would lie even for small tithes: it was objected that eggs are small tithes, and that is absurd, that an ejectment would lie of an egg. But the court said that an ejectment would lie of wool, being tithe, and by the same reason of an egg.

As to the cases in the Court of *Exchequer*, this court has, whenever it has thought it necessary, gone in opposition to the received opinions in ecclesiastical learning. In *Walton v. Tryon* (a), Lord *Hardwicke* determined against the decision in *Greenway v. Earl of Kent* (b), that timber trees above twenty years' growth were not titheable as to lop and top.

The *Attorney-General* and Mr. *Perrot* for the plaintiffs.

The defendants, admitting the common law right of the rector, found their claim upon discharge, and there-

1759.
FANSHAW
v.
ROTHERAM.

(a) *Amb.* 130. 1 *Dick.* 244. *Gw.* 827. (b) *Cit. ib.*

1759.

~
FANSHAW
 v.
ROTHERAM.

fore must have a derivative title by way of severance. A discharge from tithes could only be made out originally in two ways, by prescription or grant. Prescription was only allowed to spiritual persons, and there never has been any doubt that there could not be a prescription in *non decimando* against an ecclesiastic by a layman. The reason given in the bishop of *Winchester's* case is, that a layman could not hold tithes in perannuity.

Tithes were given originally for the maintenance of the church ; it was necessary therefore to secure them against the oscitancy and ignorance of the clergy. But as all property could be aliened *concurrentibus eis qui in jure requiruntur*, they might be discharged by real composition and grant by parson, patron, and ordinary ; but as, according to the authorities of *Slade v. Drake*, *Hob. 8 E. 4. 4. Reg. 88. F. N. B. fol. 41. ed. 2.*, it could not be without a recompense to the church, which was to be shewn in pleading. In cases of grant of discharge, all the books agree that loss of the deed is the loss of the discharge. If the evidence of them is lost, the things themselves are lost. If a spiritual person had prescribed in *non decimando*, and it was shewn that the lands had come into lay hands, the prescription was broken. Lord *Hobart* also says that the case of tithes differs from all other cases, for whereas prescription and antiquity of time fortifies all other titles, and supposes the best beginning that the law can give them ; yet, in the case of tithes, it works the contrary, for even the grant of parson, patron, and ordinary, though good in time, yet, when it runs out to prescription, it dies and perishes. And touching the discharge of tithes, and the pleading thereof at common law, it is to be observed, that they are things due of common right, and therefore, when you have a prohibition in discharge of tithes, you must consider it as a plea in bar of a common right, and you must satisfy

the court of your discharge. Therefore, though a spiritual person might prescribe in *non decimando*, a layman could not.

After the dissolution of the monasteries, the legislature, aware that the prescriptions would be put an end to by coming into lay hands, provided for this circumstance by enacting, that impropriations and tithes should be held in the same manner as they were by the religious houses. Therefore, though it is said, and truly, that they are lay fees, yet they are not so to all purposes. And in the hands of the crown, and of the patentees, they are entitled to exemption from being prescribed against by laymen. It was therefore very solemnly determined, and, upon very mature deliberation, in the case of the *Corporation of Bury v. Evans*, Com. 643, that a *non decimando* can no more be allowed against a lay impropriator, than against an ecclesiastical rector. This was followed in the late case of *Fanshaw v. More*; and there is an old case to the same purpose, of *Webb v. Warner*, Cro. Jac. 47. In *Jennings v. Lettis* the court of *Eschequer* has pursued the current of authorities, though the parties, indeed, have not acquiesced in it. The case of *Fanshaw v. Jordan*, is not in point: it was not as to prescription in *non decimando*; the defendant insisted upon a title in himself that *Stainrode* was seised, and had conveyed to him. He did not desire a presumption of the deed of severance. But in the present case the answer says that the tithes were severed, but by whom the defendant does not know. If the deed of severance is not to be shewn, it is a chicane; you do not know what deed to presume. Mere non-payment can be of no avail: for if a layman cannot prescribe, if immemorial non-payment alone cannot discharge, modern non-payment can be of no effect in raising a presumption.

It is said that the impropriator might bring an eject-

1759.

FANSHAW

v.

ROTHERAM.

1759.

FANSHAW
v.
ROTHERAM.

ment: but what impropiator would be rash enough to admit himself out of possession, which bringing an ejectment would do? As to the hardship that may attend this case, that is perfectly immaterial, for, if the law is settled, the court is bound by it. But the mischief to lay impropiators would be as great in not allowing the rule, as it can be to allow it against persons claiming. And it is no new thing to say, that a right is lost when the evidence of it cannot be produced. Toll-thorough is lost if no consideration can be shewn (*a*), so felon's goods cannot be claimed without shewing the grant.

The Solicitor-General in reply.

Though the plaintiff may have title of common right, yet if that title be doubtful, whether it be subsisting or extinguished, this court may not think proper to interpose. This is not a mere prescription in *non decimando*; it is a title. The objection that we cannot shew pernancy is not conclusive. Defendant was lessee of all the lands of which tithe is claimed, so that both in the case of himself and his grandfather, no more could be done than to retain them. If he had demised the tithes with the land, though there was no separate rent reserved, though there had been no apparent pernancy, yet the rent would have been increased in consequence. As to *Dronfield*, our title is clear; and, as to *Stubley*, it is presumable. However defective our conveyances may have been, they shew a severance, and take the title out of the plaintiff.

The Lord KEEPER.

14th March.

In this case two points have been argued at the bar,

(*a*) The modern cases upon this point are, *The Mayor of Yarmouth v. Eaton*, *Burr. Hill v. Smith*, 4 *Taunt.* 520. 1402. *Truman v. Walgham*, 2 *Wils.* 298. Lord *Pelham v. Pickersgill*, 1 *T. R.* 660.

though one only has been insisted upon. I shall therefore take notice of and give my sentiments upon both of them, though I think the present cause ought to be determined upon neither.

The first is, whether a layman can prescribe against a lay impropriator in *non decimando*, and by immemorial non-payment of tithes, acquire a right of exemption from payment of them.

I do not find the general doctrine of the books disputed that a spiritual person may, that a lay person cannot prescribe in *non decimando*, but only in *modo decimandi*. This position has been constantly maintained without any restrictions or qualifications whatsoever, both before and since the statutes made on the dissolution of the monasteries. And this harmony of the books, and invariable opinion of the judges of the realm, establishes this proposition for law in all courts of judicature, as effectually as if it had been so declared by the legislature.

The judges and reporters indeed, though they all agree in the law, may, and I believe do differ, in assigning the reason upon which this law was grounded. But this does not, in my opinion, weaken, but rather strengthens a point so fully recognized. For where the law is clear, and universally agreed upon, and yet an equitable reason does not obviously arise for the introduction of it, it is natural to suppose that, like other customs, it was introduced for general reasons of utility not now visible; and, while they are permitted to prevail by the legislature no private man should presume to question them.

But the most probable reason for its introduction seems the one assigned in the books: *in favorem ecclesiæ*. The wisdom of the law gave different liberties, rights, and privileges, to different members and orders of the community. Particularly *sanctæ ecclesiæ*. These rights are sacred, and they can never be altered but by the whole

1759.
FANSHAW
v.
ROTHERAM.

1759.

FANSHAW
v.
ROTHERAM.

community. Our kings by their coronation oaths, have from time to time been bound to defend them. And when they have been abused, or by alteration of the civil circumstances of the times, become inconvenient, the legislature has redressed them. I make these observations to shew that a fixed law, whether positive or common, is not less obligatory, because its reason is above our comprehension.

But a very good reason for this law may, in my opinion, be very easily assigned. The laws of this country had said tithes were due of common right, to be applied to the ends and purposes for which they were ordained. Consequential to that it was necessary to ordain, that the temporary possessor should not alienate them from those purposes; and, if the law had permitted a prescription in *non decimando*, a door would have been left open to such alienations, though juries had been as strict as Lord Coke supposes them regardless of their oaths (a).

If a judge therefore is to pronounce the law without any authority for fixing the reason of that law, what ground has he to alter the law, because he cannot approve the reasons that others have given, or though he may not be able to assign a satisfactory one himself? He must say, the father shall be postponed to the uncle in succession to his own son; yet the reason why land gravitates, and cannot ascend to the father, but may to the uncle, is not quite geometrical. He must have said that a collateral warranty would have bound without assets (before the legislature said otherwise) (b), though the reason in the books is not quite manly. Yet I am thoroughly persuaded that these, and all such propositions in their origin, were grounded on great and useful principles,

(a) Bishop of Winchester's case, 2 Co. 38. *ante*, 280. See a precisely similar observation of Lord Cowper, 10
(b) 4 and 5 Anne, c. 16. *Mod.* 3.

because they are a part of system of laws, that have produced the noblest constitution in the universe.

*Therefore, though Mr. *Wilbraham* would explain away this law as against a lay impropriator, and be *sine munere amicus* for the church ; yet I must be equal to both. And I am very clear, as the law now stands, that no man can prescribe in *non decimando* against a lay impropriator. The cases to this effect are too numerous to bear citation.

The next question is whether a man can avail himself of setting up a title to tithes, without giving evidence of a grant from the parson, &c., or impropriator, by shewing that grant, or by proving that such grant existed and is lost.

In the first place it is to be observed, that the parson has not in himself the mere right of things, which he has in right of the church ; the fee simple is in abeyance : so that every act that he has done may be avoided when he ceases to be incumbent, except such as were done with the consent of the patron and ordinary. The question therefore is narrowed to this : could an alienation with the consent of the patron and ordinary, be set up without producing it ?

Tithes in kind being of common right, the parson could sue for the subtraction in the court spiritual, and the only remedy for the person exempted, by discharge, or composition, or by a *modus decimandi*, was by prohibition. The tithes compounded for, or discharged by a *modus*, became lay fee, and therefore the spiritual court could not hold plea of them. And if through ignorance in such case, the owner set out the tithes, and the parson took them, he was a trespasser. The composition or *modus* became a spiritual fee, and was sueable for in the spiritual court.

Fol. 38 in the register seems to explain and confirm this state of the matter. *Rex, tali judici salutem. Monstravit*

1759.

FANSHAW
v.
ROTHERAM.
[*292]

1759.

FANSHAW

v.

ROTHERAM.

nobis A. tenens quādam partē manerii de D. quod licet E. nuper dominus manerii p̄dicti per quoddā scriptum indentatum dedisset et concessisset F. nuper personæ ecclesiæ de D. quatuor acras terræ cum pertinētis in eodem manerio, habend' & tenend' eidem F. et successoribus suis personis ecclesiæ prædictæ imperpetuum, & idem F. per prædict' scriptum de assensu & voluntate episcopi Lincolnia diocesanī loci prædicti & I. tunc patroni ecclesiæ prædictæ, concessisset pro se et successoribus suis, quod idem E. hæredes & assignati sui imperpetuum essent quieti de decimis vitulorum & lacticiniorū in manerio supradicto, pro dictis quatuor acris terræ sic sibi datis et concessis, idēmq; E. hæredes & assignati sui semper hactenus à tēpore concessionis prædictæ de decima vitulorum & lacticiniorū infra maneril p̄dict' quieti esse cōsuevissent: G. tamē nunc personæ ecclesiæ p̄dictæ tenens p̄dictas quatuor acras terræ, prædict' A. assignatum prædicti Edwardi, super decimam hujusmodi vitulorum & lacticiniorum in eodem manerio sibi præstandam, trahit in placitum coram &c. christianitatis, & ipsum ea occasione multipliciter inquietat, in enervationem concessionis & donationis prædictarum, & prædicti A. dispendium non modicum & gravamen. Et quia discussio hujusmodi donationis & concessionis de laico feodo in regno nostro initarum, in curia nostra, & non alibi tractari & fieri debet: vobis prohibemus, &c.

Now, it seems to me very clear, that by the rules of law, if the person suing this prohibition, declared in attachment upon it, he is bound to plead this indenture with a profert. The books of entries prove this, and I can see no method by which he could avail himself of this discharge, without the production of the original deed whereby he claimed this discharge.

It is observable on this writ, that the prohibition must

be supported, not only by the grant, but an averment of the continuance of the recompense to the church, *G nunc persona Ecc' præd^e tenens præd^e 4 Acras*: which makes the position of Lord *Hobart* in *Slade v. Drake*, fo. 297, questionable, that the grant of parson, patron, and ordinary, is good of itself, without any recompense or consideration: though that notion seems to be countenanced in the bishop of *Winchester's* case, 2 Co. 38. But that opinion seems to be grounded on this, that a recovery against the parson with an *aid prier* of the patron and ordinary, and judgment by default, would bind the church. Which I conceive was owing to the credit of a recovery intended to be made on title, for I cannot find that parson, patron, and ordinary, could alien the possessions of the church, without a perdurable recompense.

I am therefore of opinion, that at common law, no man could avail himself of a discharge from tithes by grant, but by producing it.

The next consideration is, what difference is introduced by the statutes, and whether title can be made to tithes without producing such grant at this time.

By stat. 31 H. 8. c. 13. s. 2. parsonages appropriated, belonging to dissolved monasteries, are to be held and enjoyed by the king, his heirs and successors, in as large and ample a manner and form, as the religious persons held the same. Now the religious persons held the appropriations with a title by common right to tithes, uncontrolled by a prescription in *non decimando*, or by any title set up against them by any means but a grant produced, shewing a severance, or by real composition, as I have before endeavoured to make out.

In this sense the statute is taken by the court in the case of the *Corporation of Bury v. Evans*, Com. Rep. 651, where this observation is made, "As Lord *Hobart* saith, in *Slade* and *Drake's* case, fo. 296, a temporal person succeeding a spiritual person in discharge (and it is

1759.

FANSHAW
v.

ROTHERAM.

[294]

At common law
no man could
avail himself of
a discharge from
tithes by grant
without produc-
ing it.

1759.

FANSHAW
v.
ROTHERAM.

[295]

the same in the perception of tithes), is to be reckoned as a spiritual person, and not as a temporal; and consequently a man who could not prescribe against an ecclesiastical person, cannot any more prescribe against the patentee, who derives his title from and under him, and is in nature of his representative." If he cannot prescribe against a temporal person, which must be by plea, because that temporal person is in, *virtute* and *vi statuti*, in the place and capacity of the spiritual, the same reason holds against his pleading in any other manner, or any other discharge or exemption against a temporal, than he could have insisted on against a spiritual person.

But it is said, that tithes are now become lay fees, and persons may have remedy for recovering their rights to them in the king's temporal courts; and that they may be assured and conveyed as lands and tenements; and therefore it is said that a man may make the same title to tithes as to any other inheritance, and that he may supply the loss of this original grant by subsequent conveyances and possession. But it seems to me that this statute 32 *H. 8.* is silent as to the *manner* in which a person must make out his right to tithes against the church, or patentees standing in the place of the church. The statute seems to have left that as it stood at law, and only provides that a person lawfully seised or possessed of tithes, and disseised or put out, might assure and recover them in the king's courts, like other temporal possessions. Before this statute the king's temporal courts exercised no jurisdiction over them: they could not be demanded in a *præcipe* or other writ; no writ of covenant, no fine could be levied of them; and the statute supposes that the *Chancery* was to devise and form new writs for recovery of them; though this was found unnecessary, as the judges were of opinion that a special count would answer that purpose.

The statute of *H. 8.* is silent as to the manner in which a person must make out his right to tithes against the church or patentees standing in the place of the church; and only provides for the assurance and recovery of them, like temporal possessions in the king's court.

But the statute was anxious not to be expounded so as

to vary the trial of the right to take them, or the defence against paying them. And therefore the seventh section provides, "That this act shall not extend, nor be expounded to give any remedy, cause of action, or suit in courts temporal, against any person refusing to set out his tithes. But in all such cases the person, being ecclesiastical or lay, shall have his remedy in the spiritual court, according to the ordinance in the first part of this act (section 2.), and not otherwise." So that this act seems to have left the suit for subtraction of tithes, and the defence against such action, as it was left by the statute 27 H. 8. c. 20., where in section 3 the proviso is, "That every person and persons, being parties and privies to any such suit, shall and may make and have his and their lawful action, demand, or prosecution, appeals, prohibitions, and all other defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample and liberal manner and form as they might have had, if this act had never been made."

1759.
FANSHAW
v.
ROTHERAM.
[296]

It is true that in all cases of temporal rights, the courts of law consider *quieta, longa, et pacifica possessio* as the best evidence of title: I think it one of the wisest and most solid rules of the law. They will therefore presume stale titles in writing barred by other conveyances probably lost; because the possession contrary to those conveyances, cannot otherwise be accounted for. Possession is so strong a title, that a judge may have emphatically said, he would presume an act of parliament to support and confirm it (a). Possession is a title to recover upon,

Effect of length
of possession.

(a) So Lord *Kenyon* is reported to have said, that he would not only presume one, but one hundred grants, if necessary, to support a long enjoyment. 11 *East*, 284, 16 *East*, 339. See also the Mayor of *Kingston-upon-Hull* v.

1759.

FANSHAW
v.
ROTHBRAM.

and *primâ facie* evidences the mere right. But not in this *anomalum*, the case of tithes: for there it evidences no right, though it should be *ultra memoriam hominis quieta et pacifica*. Where possession evidences a right, there may be reason to presume somewhat to answer a stale and latent title: but where possession does not evidence a right, there seems to be no grounds for such a presumption; because that would be to presume a title. I suppose in this reasoning that I have before proved, what is in effect conceded, that simple possession is as ineffectual against a lay impropriator as against a spiritual person.

But it is objected, if this be so, no man can safely purchase from a lay impropriator, for the deed of severance cannot be preserved for ever; and if the deed be lost, the title is lost, and the inheritance purchased reverts to him that sold it. But I by no means think this consequence would ensue; for I do not think it necessary to this defence to produce the deed of severance, but to give evidence that there was one. The law requires only the best evidence that the thing in dispute will admit of, and a very slight proof might be sufficient to establish such a deed of severance, though it were lost.

Not necessary to produce the deed of severance: sufficient to give evidence that there was one,

Horner, Comp. 102. *Powell mood v. Oglander*, 6 *Ves.* 205. *v. Milbank*, cit. *ib.* *Earl v. Lady Dartmouth v. Roberts*, *Baxter, Bl. Rep.* 1228. *Rogers* 16 *East*, 334. *Doe v. Reed*, 5 *v. Brooke*, 1 *T. R.* 431, n. *B. & A.* 232. See also the cases cited in Serj. *Williams's* note to *Yard v. Ford*, 2 *Read v. Brookman*, 3 *T. R.* 151. *Doe v. Sybourn*, 7 *T. R.* 2. *Jones v. Jones*, *ib.* 47. *Oxenden v. Skinner*, *Gm.* 1513. *Campbell v. Wilson*, 3 *East*, 294. *Holcroft v. Heel*, 1 *Bos. and Pul.* 400. *Roe v. Ireland*, 11 *East*, 280. *Har-*

And, therefore, the opinion that I give is only that a title cannot be set up at law against the common right by length of possession of the tithes, or by simple grants of them, or by both together.

I have given my opinion upon the points of law abstractedly considered: I will now apply them to the particular evidence of this case, and to the jurisdiction of this court.

9 Feb. 30 *Elix.* this rectory of the church of *Dronfield* was vested in the crown, and the tithes arising in *Dronfield* and *Holmsfield* were severed and granted to *Edmund Downing* and *Miles Doding*, and their heirs. I am of opinion that from that moment these parcels became lay fee, discharged of all privilege and protection that was connected to them by the statutes as spiritual inheritances; and that, between the proprietors of them, and all persons claiming under the grantee, every species of defence was and is competent as between plaintiffs and defendants, in a contest respecting any other lay inheritance; and the reconveyance of these tithes not being produced, I cannot consider the plaintiff as making any title to them.

The residue of this rectory, for what appears to the contrary, continued in the crown to the 24th of *May*, 1612, and is then granted to *Francis Morrice* and *Francis Phelps*, and their heirs, and particularly all tithes in *Coldaston* and *Stubley*, *int. al.* 4 July, 4 Car. 1628. The said premises are conveyed for a consideration of £750 to *Lionel Fanshaw* and his heirs. From 1628 to this time, a period of 131 years, this residue is supposed to have descended without any intervening settlement to the present plaintiff; and though no enjoyment has ever been had of the right in question, which all this time has been alienable, a court of equity is desired to interpose,

1759.

FANSHAW
v.
ROTHERHAM.

[298]

1759.

FANSHAW
v.
ROTHERAM.

and disturb a right enjoyed for almost a century and a half.

Now, that kind of equity is beyond my comprehension. Bills for quieting men in their rights and possessions against the latitude of legal controversies, and multiplicity of suits, have manifest equity dealt with a sober hand. But bills to disturb and disquiet men's possessions would be in the highest degree rigorous and oppressive. The voice of the law is *caveat emptor*; the voice of equity is, *teneat emptor*, though his title be bad and defective, if he has not purchased with iniquity.

[299]

The defendants appear before me with a merit which this court ever recognizes; the merit of being purchasers for a valuable consideration: with respect to the tithe of *Dronfield* and *Holmsfield*, they appear to be purchasers before the grant of *Jac. 1.*, in which the grant of *Queen Elizabeth* is excepted; and with respect to the tithe in *Stubbley*, they are purchasers in the year 1632, with a regular deduction of title to the defendants.

So that I should decree for the plaintiff against about 130 years' quiet possession, when he, and those in whose place he stands, have been guilty of a wilful and inexcusable negligence during that whole period. And upon what? Because the title of the purchaser may be defective in law. Now that seems to me to be contrary to all equity; a purchase for a valuable consideration is a bar to the jurisdiction, unless repelled by shewing that the purchase was made against conscience. Will it be said they purchased with notice of the common law right of the rector? How can I say *that* at this distance of time? How can I say that no other parts of this rectory were severed? That the purchasers were not made to believe they were? And either of these cases would bring them under the protection of this court. Nay, I

am of opinion, the paying their money does; and that the plaintiff must repel the merit of that, by affecting the purchase with iniquity, to entitle himself to the aid of this court.

I may be mistaken; but in my judgment and conscience, I think I should pronounce on the most narrow and illiberal principles in decreeing for the plaintiff, and make this court an inquisition to torture men's titles.

However, I have much more able judgments than my own to strengthen me in this opinion. The case of *Medley v. Talmey*, 8 W. 3. was much weaker for the defendant than the present case. There the defendant insisted only on a deed of purchase of the land tithe free in 1652; and though but forty-two years' possession in the defendant, and consequently the same laches in the plaintiff, the court left the parties to law, and dismissed the bill. The observation on this case in *Comyns* is, "It is probable the defendant had a legal exemption, which the plaintiff was conscious of, but thought to take an advantage of the loss of the defendant's deeds: but the court not favouring his design, dismissed his bill." It is ten times as probable here, that the defendant originally had a title. For the tithes themselves have been actually bought and conveyed several times over.

The next case is the *Corporation of Warwick v. Lucas*, where a defendant insisted generally on a discharge by virtue of a prescription, bull, order, or other lawful means, and had ever since been held free. The bill was dismissed. Now in these two cases the court determined that equity could not give its assistance to disturb men's possessions, for in neither was there any pretence of a severance.

And the comment in the report to avoid the effect of them is destitute of truth and sense. It is said, "In these cases it did not appear directly whether the defend-

1759.

FANSHAW
v.
ROTHERAM.

[300]

1759.

FANSHAW
v.
ROTHERHAM.



[301]

ant could make out a legal discharge or not." Now in *Medley v. Talmey*, it directly appeared that he could not, for the defendant only insisted upon, and only proved at the hearing, the deed of 1752, and swore by his answer all other deeds were lost. In the second case no particular exemption was insisted upon by the answer, yet the report goes on, "It was probable they could, and the plaintiffs thought it so probable, that they cared not to try that point, and consented the bills should be dismissed without costs." Now how could the plaintiffs think that the defendants could shew a severance or composition, when they had alleged no such thing in their answers? But what is the conclusion? "If the defendant has a probable ground of discharge, it is not proper to decree against it, without putting it in a way of examination, which the court seemed willing to do in these cases." And in the case of the *Corporation of Bury v. Evans*, the grounds of the determination with respect to the discharge were, "There is nothing to induce a probability that *Eldo Farm* and *Old Haw Farm* were the same;" so that, with respect to the present case, I consider these three cases as authorities for my decision.

But here I desire to be understood that I express no concurrence in the other point in the *Corporation of Bury v. Evans*, viz. that a court of equity would decree against a long and pacific possession, if no probable discharge is alleged. For, 29 Car. 2. Dr. Reeves, dean of Windsor, exhibited his bill against Mr. Levison, to discover writings concerning some tithes in *Woolverhampton*, parcel of the corporation of the deanery: the defendant pleaded a fine, levied Hil. 13 Eliz. and a non-claim by the present dean, which was allowed to be a good plea. For as I am at present advised, I renounce all concurrent jurisdiction on the legal right of tithes, and think I can only decree on an equity.

I do not know whether the authority of these two cases has ever been decreed against; they have never been appealed from, which gives them great strength in my eye; and the case of the *Corporation of Bury v. Evans* is a mere legal determination without a grain of equity.

It is a hard case to make a man lose what he has innocently purchased. So hard, that the rigour of the law treats it with equity. A mortgagee getting a verdict against the opinion of the judge, shall not be molested with a new trial for the honesty of the cause (a). A wrong-doer, *per negligentiam*, shall have the same indulgence (b). And shall a court of equity wrest from the owner inheritances descended from an ancestor, and bought with the patrimony of a family? I profess I cannot, as a judge of this court, have a difficulty; *Equitas enim lucet ipsa per se, dubitatio cognitionem significat injuriæ* (c)

Bill dismissed as to this point with costs.

(a) This alludes probably to *Smith v. Page*, *Salk.* 644.

(b) *Smith v. Frampton*, *Salk.* 644. *Sparks v. Spicer*, *ib.* 648, and generally in hard actions new trials are refused.

Deerley v. Duchess of Mazarine, *Salk.* 646. *Boucher v. Lawson*, *Ridgw. Ca. temp. Hard.* 201. *Macrom v. Hull*, *Bur.* 11. *Farewell v. Chaffey*, *ib.* 54. *Burton v. Thompson*, *ib.* 664. *Marsh v. Bower*, *Bl. Rep.* 851. *Reavely v. Mainwaring*, *Bur.* 1306. *Goslin v. Wilcock*, 2 *Wils.* 302.

Edmonson v. Machell, 2 *T. R.* 5. *Wilkinson v. Payne*, 4 *T. R.* 468. *Cox v. Kitchen*, 1 *Bos. and Pul.* 338. *Carstairs v. Stein*, 4 *M. and S.* 192.

(c) The subsequent decisions, which are numerous, have entirely confirmed the doctrine contained in the above judgment. The principles which they establish are, 1st, That a lay impropiator has every advantage that a spiritual rector possesses. This has been frequently the subject of regret, and was once

1759.
FANSHAW
v.
ROTHERAM.

[302]

1759.

~
FANSHAW
v.
ROTHERAM.

attempted to be remedied by legislative interference. (2 *Gw.* 780.) The courts too have occasionally exerted themselves to alter it. Lord *Eldon* has observed (17 *Ves.* 127), that there was a decision in the court of *Exchequer* against it in the year 1727, and that both Lord *Talbot* and Lord *Hardwicke* struggled against it. Lord *Loughborough*, in an opinion (which, however, *Richards*, C. B., 2 *Price*, 367, has shewn to have been altogether extra-judicial), expressed himself strongly against the doctrine, 5 *Ves.* 188; in addition to which the considerable authority of Mr. Baron *Wood* has strenuously controverted it. The courts have, however, considered it too firmly settled to be now overthrown. 2dly. That it is not necessary to produce the grant; it is sufficient to shew that such a grant did exist: (analogous to the case of composition real, where the court expects evidence of the deed having existed:) *Knight v. Halsey*, 2 *B. and P.* 206. *Hawes v. Swaine*, 2 *Cox*, 179. *Sambridge v. Benton*, 2 *Anstr.* 372. *Heathcote v. Mainwaring*, 3 *Bro. C. C.* 217.

Gw. 1345. *Bennet v. Neale*, *Wightm.* 324. *Chatfield v. Fryer*, 1 *Price*, 253. *Estcourt v. Kingscote*, 4 *Mad.* 140. *Bennet v. Skeffington*, 1 *Dan.* 14. 4 *Price*, 143. *Ridley v. Storey*, 1 *Dan.* 157. 3dly, That mere non-payment and retainer alone (which amount to nothing more than *non decimando*), are not sufficient evidence to induce a court to presume that such a grant existed: there must be actual possession, occupation, and pernancy of the tithes; or where the defendant has been in possession of the lands, a coupling of the fact of retainer with the making the tithes the subject of lease or conveyance *under colour of title*. *Jennings v. Lettis*, on the rehearing, *Gw.* 952. *Scott v. Airey*, *ib.* 1174. *Strutt v. Baker*, 2 *Ves. jun.* 625. *Gw.* 1430. *Nagle v. Edwards*, 3 *Anstr.* 702. *Gw.* 1442. Lord *Petre v. Blencoe*, 3 *Anstr.* 945. *Gw.* 1484. *Berney v. Harvey*, 17 *Ves.* 119. *Heathcote v. Aldridge*, 1 *Mad.* 236. *Meade v. Norbury*, 2 *Price*, 338, on appeal, 3 *Bligh*, 211. *Williams v. Bacon*, 1 *S. and S.* 415.

140 Ch. D. 145 f.

STRACHAN v BRANDER.

(Reg. Lib. B. 1758. fol. 228.)

1759.
12th, 13th, 14th,
and 15th March.
S. C.
cit. 18 Ves. 127.

[*304]

THE plaintiff, Sir *John Strachan*, was heir at law of *Jacob Banks*, esq. of *Milton Abbas*, in the county of *Dorset*, at whose death, intestate, in *February 1737*, he was living in great obscurity at *Paris*, having left *England* at the age of 12, in the year 1718. He was at that time in great poverty, and totally ignorant of his rights. *Charles Brander*, the father of the present defendant, * who was acquainted with the pedigree, brought him over from *Paris* at his own expense, promised to put him into possession of his estate, and as part of it was claimed by one *Tregonwell*, as heir *ex parte maternâ* to Mr. *Banks*, he promised to support him with his purse, credit, and interest.

On the 20th of *April*, 1738, in company of the defendant, *Willis*, an attorney, and *Brander*, he took possession of the manor of *Somerford*, and a farm called *Lascombe*, which, having been purchased by Mr. *Banks*, were not claimed by *Tregonwell*; and on the same day, by indentures of lease and release, bearing date the 18th and 20th of *April*, 1738, reciting that *Banks* had made a will, devising certain premises to *Brander*, but that having afterwards sold part of those premises, he revoked the will, but had always expressed his intention of leaving the said manor and farm to *Brander*, in consideration thereof, and of *Brander's* services to *Strachan*, he conveyed the said manor and farm to the defendant *Spicker*, in trust for *Brander* and his heirs. On the same day he executed a letter of attorney to *Brander*, dated the 17th

Gift obtained from an heir at law ignorant of his rights, by one who undertook to support him in obtaining possession of his estate, set aside under the circumstances: also money having been advanced to him by a subscription from different persons, and among the rest from his attorney, to enable him to prosecute suits; and an absolute bond having been taken from him for double the sum lent, with a defeasance executed some days after, declaring that, if he did not recover the estate, or half of it, the bond was to be delivered up: held to be unconscionable, savouring of champerty, and dangerous to public justice.

1759.

STRACHAN
 , v.
 BRANDER.

[305]

of *April*, in which was contained a covenant to repay him all the expenses which he had been at on his account. And on the same day he also executed a will, bearing date the 22d of *April*, 1738, in which he devised all his real estates to *Brander*, subject to an annuity of £500.

Tregonwell still contesting the other estates, and a trial at bar of the court of *King's Bench* being to come on (a), *Brander*, and *Willis*, who was the plaintiff's attorney in the suit, informed him that they could not go on with it, unless he borrowed £1000: an agreement was accordingly entered into, that if they would procure him £1000, he would execute a bond for £2000, payable in case he succeeded in the suit. Accordingly, on the 3d of *November*, 1738, at *Willis's* chambers, he executed an absolute bond to the defendant *Spicker* (the money having been advanced by different persons, who were defendants, in various proportions, and £200 of it by *Willis*), in £4000, conditioned for the payment of £2000: this bond was attested by *Willis*. No defeazance was made at the time, but the bond was left in *Willis's* hands, and in about a week afterwards a defeazance was executed of the same date as the bond, which it recited, declaring that if the plaintiff did not recover the estate or half of it, the bond was to be delivered up.

This was a bill by the plaintiff against the representatives of *Brander* (who was since dead), *Willis*, and the other persons who advanced the £1000, to set aside the indentures of the 18th and 20th of *April*, 1738, and to have the bond delivered up, upon payment of what had been advanced, &c.

(a) On the trial a special verdict was found; for the report of which, *vid.* 1 *Wils.* 66. *Stra.* 1179. *Willes*, 444, the elaborate judgment of *Lee*, C. J. cit. 5 T. R. 107 n. and 6 *Bro. P. C.* Ed. *Toml.* 319.

It appeared that the plaintiff had remained in possession of the estate from the time he first took possession of it, and several letters were read from *Brander*, to shew that he had acted for the plaintiff as his agent, and on one occasion recovered a fine of £48 from the defendant *Footner*, one of the tenants. It also appeared that *Brander* and *Willis* had taken several opinions of counsel before the money was advanced.

The *Attorney-General*, Mr. *Perrot*, Mr. *Glynn*, and Mr. *Wedderburne* for the plaintiff.

This conveyance is on a fictitious consideration: the plaintiff neither knew the value of the estate nor the intention of the testator: it comes under the numerous cases of young heirs. *Earl of Arglasse v. Muschamp*, 1 *Vern.* 75. *Wiseman v. Beake*, 2 *Vern.* 121. *Curwen v. Milner*, cit. 3 *P. W.* 292. *Lawley v. Hooper* (a).

The *Solicitor-General* and Mr. *Jones* for the defendants.

This is by no means a case of imposition. The plaintiff was in a foreign country, necessitous, ignorant of his title, and incapable of asserting it. It was a great point for him to have the assistance of Mr. *Brander*, who alone knew his title. There is no doubt that a man under no imposition may convey away his estate even without any consideration at all. Here was no imposition on weakness, no imposition on distress; the plaintiff did it with his eyes open, and as a return for being raised from indigence to affluence. As to the bond, there is no objection to it at law.

The Lord KEEPER.

Does it not come under the description of champerty?

(a) 3 *Atk.* 278.

x 2

1759.
STRACHAN
v.
BRANDER.

[306]

1759.

STRACHAN
v.
BRANDER.

For the defendants.

To make it champerty, it ought to be made payable out of the estate, which is not the case here: the derivation of champerty is well known to be *campi partitio*.

The Lord KEEPER.

[307]

(a) I am of opinion that the deeds of the 19th and 20th of *April* were obtained by misrepresentation, imposition, and undue advantage taken of the necessitous situation of the plaintiff, at a time when he was totally unacquainted with the respective values of the several estates, and before he had taken possession of some of them, and upon mere colourable and fictitious considerations. And that it appears by the letters of Mr. *Charles Brander*, the grantee, that he entered on possession thereof as agent for, and accountable to, the plaintiff; and therefore the said conveyances cannot be supported as absolute conveyances in a court of equity. But the plaintiff having submitted, by his will, that they should stand as a security for what should be due to the estate of the deceased Mr. *Brander* for any labour or trouble taken in the plaintiff's affairs, let it be referred to the Master to inquire and take an account of what Mr. *Charles Brander*, deceased, deserved for any labour and trouble taken by him in the plaintiff's affairs beyond any satisfaction already made by the plaintiff. And upon the plaintiff's paying to the representatives of Mr. *Brander* what shall be due on that account, after deducting what shall be coming on the account of the rents and profits hereinafter directed; and after a deduction of the costs hitherto of this suit, so far as it relates to the said con-

(a) This decree, as drawn up by his lordship, is entered in the Register's book.

veyances, which the Master is directed to tax, let all parties join in a reconveyance of the said estates, with the approbation of the Master, to the plaintiff and his heirs; and let the Master take an account of the rents and profits received by Mr. *Brander*, or any of the other defendants; and let what shall be received by them personally be answered by them, and such as have been received by those that are dead, out of their respective estates; and if assets are not admitted, let an account be taken of them. And if, in taking such accounts, it shall be found that defendants have received any fines, let the Master compute interest thereon at 4 *per cent.*, particularly on the fine of £48 received by the defendant *Footner*, against whom this bill is dismissed without costs.

And as to the bond, I am of opinion that the same was an imposition on the plaintiff: no defeazance being inserted in the condition, pursuant to the agreement on which the money was lent, nor any given till some time after the bond was executed, and that not a legal defeazance: and Mr. *Willis*, the plaintiff's attorney, being made a witness to the said bond, when he was interested £200 in the money advanced. And that the bargain for receiving £2000 for £1000 on the contingency in the defeazance was unconscionable, savoureth of champerty, and is dangerous to public justice: therefore let it be referred to the Master to take an account of what is due for interest on the said £1000 at 5 *per cent.*, and tax the said defendants their costs. And let the Master tax the plaintiff his costs of this suit, hitherto as relates to this bond; and let the same be deducted out of what shall be found due for principal and interest of the said £1000, and the said costs. And upon the plaintiff paying the residue to the defendant *John Spicker*, let the bond be delivered up to be cancelled; and let him dis-

1759.

STRACHAN
v.
BRANDER.

[308]

1759.

STRACHAN

v.

BRANDER.

tribute the same to those who advanced the same according to their respective proportions.

[*309]

The court, upon general principles of policy, will not permit an attorney to accept any thing from his client, pending the suit, except his demand; though, perhaps, in the particular instance there may be no unfairness. *Proof v. Hines*, For. 111. *Walmsley v. Booth*, 2 Atk. 25. *Drapers' Company v. Davis*, Ib. 295. *Saunderson v. Glass*, Ib. 296. *Oldham v. Hand*, 2 Ves. 259. *Welles v. Middleton*, 1 Cox, 112. 4 Bro. P. C. Ed. Toml. 245. *Leigh v. Williams*, and *Kennet v. Greenvillers*, cit. 3 Cox, P. W. 131. n. *Kenney v. Browne*, 3 Ridg. P. C. 462. *Newman v. Payne*, 2 Ves. jun. 199. 4 Bro. C. C. 350. *Wood v. Downes*, 18 Ves.

120. *Montesquieu v. Sandys*, Ib. 302. *Jones v. Tripp*, 1 Jacob, 322.

The same principles apply *to gifts from persons, in the situations of guardian and ward, or between whom a similar confidence exists. *Osmond v. Fitzroy*, 3 P. W. 129. *Hylton v. Hylton*, 2 Ves. 547. *Pierce v. Waring*, cit. ib. et 1 Ves. 380. *Griffin v. Devenille*, cit. 3 Cox, P. W. 131. n. *Hatch v. Hatch*, 9 Ves. 292. *Morse v. Royal*, 12 Ves. 355. *Dawson v. Massey*, 1 Ba. and Be. 219.

As to purchases by attorneys from their clients, or trustees from their *cestuys que trust*, vide post. *Clarke v. Swaile*, Vol. II. 134.

As to the question of champerty, vide *Kenney v. Browne*, *Wood v. Downes*, cit. ante, and the authorities from *Hawkins*, which are there cited; also *Powell v. Knowler*, 2 Atk. 224.

Wallis v. the Duke of Portland, 3 Ves. 494. and *Stevens v. Bagwell*, 15 Ves. 138. *Hartley v. Russell*, 2 S. and S. 244. *Stone v. Yea*, 1 Jacob, 426.

FRANKS v. MARTIN.

Et e contra.

(*Reg. Lib. A. 1759. fol. 286.*)

1759.
7th, 8th, and 9th
May,
S. C.
Core, MSS.
Serj. Hill's MSS.

ABOUT the year 1720 a treaty of marriage was entered into between Mr. *Isaac Franks*, a considerable dealer in jewels, who was worth about £80,000, and *Sincha* or *Frances*, the eldest daughter of Mr. *Moses Hart*, an eminent stock-broker. Mr. *Hart*, on the treaty respecting the marriage settlement, being unwilling to part with any considerable sum of ready money, which was necessarily employed by him in his business, proposed to Mr. *Franks* to give him a present fortune of £6000 with his daughter, together with £600 for clothes; and to secure the payment of such additional fortune as is mentioned in the following articles, for the benefit of the intended husband and his wife, and their issue. The parties being German Jews, articles of agreement in the Hebrew language were accordingly entered into, and executed by *Moses Hart*, *Isaac Franks*, and *Sincha Hart*; which articles were set out in the bill as translated by a notary public, skilled in that language, to the following effect.

Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, and unintelligible.

[310]

“ On *Tuesday* the 5th day of the month *Sivan*, in the year 5480 from the creation of the world, according to the way of reckoning we use here in the city of *London*; Before us, the underwritten (witnesses) personally came and appeared, Mr. *Moses* the son of *Naphtali Hart*, deceased, and Mr. *Isaac* the son of *Naphtali Hart Franks*, deceased; who, in order to confirm and corroborate these presents, did, before us, sign the same, as also the trans-

1759.
 ~~~~~  
 FRANKS  
 v.  
 MARTIN.

lation thereof, which was made from the Hebrew into the English language in presence of the notary public, named *Thomas Baky (Bocking)*, both being of the same tenor and date; the only difference being, that the said translation, which they have likewise signed, is written in the English language, in order for them the better to understand the true meaning of the contents thereof. And these are the conditions, mentioned with truth and justice, which are made pursuant to the commands and statutes of our Holy Law, and the institutions of our rabbies of blessed memory.

“The first condition is as usual, the gentleman (the said *Isaac Franks*) did declare before us that he doth intend to marry the maiden lady, Miss *Sincha*, the daughter of the said *Moses*, with a wedding ring, and under a canopy, according to the law of *Moses* and *Israel*; and did say, by reason of the love and affection he doth bear for her, he is willing to make an addition to her marriage portion; whereupon we, the underwritten witnesses, took possession of him (the said *Franks*) by his signing these presents; and he did oblige himself to give unto her the sum of £9000 sterling; and agreed also that all her paraphernalia, be the same of silver, gold, or jewels, for the use or ornament of her person, and all her wearing apparel, and the furniture belonging to the house, do and shall belong unto her. This is the first condition.

“The second condition. It is declared and agreed by and between the said parties, that if the said *Isaac* shall happen to depart this life within the first year of his marriage, without leaving any issue begotten on the body of his (said intended) wife, the said *Sincha*, daughter of the said *Moses*; then and in such case his said wife shall have but £6000 sterling (being the sum of £6000 sterling her father did give her) and all the silver, gold, and

jewels belonging to her as aforesaid, and her wearing apparel and furniture belonging to the house; and if the said gentleman shall happen to die after the first year of his said marriage, then and in such case his wife, the said *Sincha*, shall have the sum of £7500 sterling, and all the silver, gold, jewels, wearing apparel and furniture above-mentioned. But if the said gentleman shall happen to die after the expiration of two years, to be accounted from the time of his said marriage, then and in such case his said wife shall have the sum of £9000 sterling, and all the silver, gold, wearing apparel and furniture belonging to the house. This is the second condition.

“ Thirdly, if the said wife *Sincha*, the daughter of the said *Moses*, shall happen to die within the first year of her marriage, then and in such case the said *Isaac* shall be obliged to return the marriage portion, being the sum of £6000 sterling, and all her wearing apparel and paraphernalia which her father, the said *Moses*, did give her: and if the said wife, *Sincha*, shall happen to die in the second year after her said marriage, then and in such case the said Mr. *Isaac* shall be obliged to return the sum of £3000 sterling, and all her paraphernalia and wearing apparel which her father did give her; but if the said wife, *Sincha*, shall die after the expiration of two years, then and in such case the said *Isaac* shall be free, and shall not be obliged to return to her father, the said *Moses*, his heirs, or assigns, anything whatsoever, agreeable to our law, which is, that the husband doth inherit the marriage portion brought by his wife, which said law is agreeable to the law received on Mount *Sinai*. This is the third condition.

“ The fourth condition. The said Mr. *Moses* spontaneously of his own accord, and without the least compulsion whatsoever, but heartily with a willing mind, and after mature deliberation, did oblige himself, saying in

1759.  
FRANKS  
v.  
MARTIN.

[ 312 ]

1759.  
 FRANKS  
 v.  
 MARTIN.

[ 313 ]

manner following : I do take upon myself as an absolute debt, and will that the same shall be upon me and upon my heirs after me as an absolute debt, that my children after my decease shall perform all the articles herein mentioned ; that my said daughter *Sincha*, the intended wife of my intended son-in-law, Mr. *Isaac*, the son of Mr. *Naphtali Hart Franks*, deceased, he and her children begotten by her said husband, the said Mr. *Isaac*, shall divide with my sons half a share of a son, that is to say, all what I shall think proper to be inherited by the most beloved of my sons ; my said daughter and her issue shall inherit half a share of a son ; and my said intended son-in-law shall be curator and guardian of her share which she shall so inherit from me in his lifetime and after my decease ; I have conditioned and obliged myself in this express manner, that my daughter *Sincha*, and her issue, and her said husband, shall inherit half a share of a son, exclusive of the real estates, houses and lands which I have purchased to this day, in which my said son-in-law and daughter shall not have any share or inheritance, but the same shall all belong to my sons only. And my meaning and intention likewise is, that if, when God shall be pleased to take me out of this world, any of my daughters shall happen to be spinster and unmarried, then, and in such case, each and every of my said maiden daughters shall first of all take their portions of £6000 sterling, and £600 sterling more for clothes or apparel, for her or their share out of the whole estate which I shall die possessed of. And the reason why they shall so take first the said sums is, because I now give my daughter *Sincha*, the (intended) wife of my said (intended) son-in-law Mr. *Isaac Franks*, £6000 sterling for her marriage portion, and clothes or apparel to the amount above-mentioned : and after my said unmarried daughters shall have received the same, then the rest, residue and remainder I

shall die possessed of, shall be divided in manner following: that is to say, to my sons two shares, and to the gentleman, my (intended) son-in-law, and my daughter *Sincha*, and her issue, and the rest of my daughters, to each of them half a share of a son as aforesaid, exclusive of the real estates, houses and lands I am at this present time possessed of; and my meaning and intention also is, that if my said daughter *Sincha* shall die without leaving any issue, then and in such case my said (intended) son-in-law shall have no claim or demand upon me or upon my children; and if my said daughter shall die leaving issue, and afterwards the said issue shall also die, then and in such case, after the death of my said (intended) son-in-law, Mr. *Isaac Franks*, the sum which my said (intended) son-in-law, my daughter, and her issue, shall have inherited, shall be and belong to me, and my children and heirs for ever for their inheritance; and this is expressly so conditioned, in order that my estate may not be lessened upon that account. All which said conditions they, the said parties (to wit), Mr. *Moses*, the son of *Naphtali Hart*, deceased, and Mr. *Isaac*, the son of Mr. *Naphtali Hart Franks*, deceased, have bound and obliged themselves to perform; and thereupon we (the said witnesses), on the part and behalf of the said woman, have taken possession of the said parties by a proper instrument for taking possession without ambiguity or reservation, and not as if it was a copy of an agreement, but an absolute one, annulling and making void any protests or writings which do or shall contradict these presents, in the same terms our rabbies make use of to annul protests, &c. and all is right, strong, and binding."

Two parts of these articles were written in Hebrew, and in the character made use of among the German Jews by *Aaron Hart*, head rabbi of the German Jews' synagogue in *London*, and brother of the said *Moses*

1759.

FRANKS  
v.  
MARTIN.

[ 314 ]

1759.  
 FRANKS  
 v.  
 MARTIN.

*Hart*; and were signed, sealed, and delivered by the parties, and *kinyan* or possession taken thereon, which is a ceremony used among the Jews in the obligations which they mean to make the strongest and most binding.

At the time the above articles were entered into, Mr. *Hart* had only one son living, named *Hyam*, who was then about ten years of age, and four daughters, viz. the said *Sincha* or *Frances* his eldest daughter, *Judy*, *Bilah*, and *Rachael*.

Mr. *Moses Hart* was a German Jew, and Mr. *Isaac Franks* the son of a German Jew; and the above contract so entered into between them was the usual marriage settlement between German Jews, among whom it was said to be customary, on the marriage of a daughter, to secure to her, or her issue, a share of their fortunes in proportion, or with reference to the share of a son; so that in case of intestacy, the estate of the father shall be considered as divided among his children in such manner that the son or sons, if any such shall be living at the death of the father, shall take double the share of a daughter; and if the father shall by his will give to any son more than he would have been so entitled to in case of an intestacy, then the daughter, or her issue, shall have a moiety of such larger share; and if there shall be no son living at the death of the father, then she, or her issue, shall be entitled to an equal share with the other daughters, considering the estate as to be divided among them.

[ 315 ]

On the 31st of *May*, 1720, the marriage was solemnized by *Aaron Hart* the rabbi, the said *Moses Hart's* brother; and it being usual to read over and explain such marriage contracts in the presence of the subscribing witnesses, to the parties who declare their assent or agreement to the contents thereof, the same was done in the present case, and assented to.

There was issue of this marriage *Henry Isaac Franks*, and the plaintiff, *Phila*, the only two children of the said *Isaac Franks* and *Sincha* his wife.

In 1723, *Judy*, Mr. *Hart*'s second daughter, intermarried with Mr. *Elias Levy*, to whom he gave the same fortune as Mr. *Isaac Franks* had with his wife; and in 1743, *Bilah*, his third daughter, intermarried with *Aaron Franks*, to whom Mr. *Hart* gave £10,000 for a portion; and some time after added £4000 more to Mrs. *Levy*'s fortune, to make her equal with *Bilah*, the wife of the said *Aaron Franks*; but he gave nothing more to *Sincha*. In 1730, *Rachael*, the fourth daughter, intermarried with *Michael Adolphus*, upon whom Mr. *Hart* settled an annuity upon her for life of £1000 *per ann.*, to which he afterwards made an addition.

*Isaac Franks*, who died in *October*, 1736, by his will gave his said wife £9000 sterling, and all her jewels, not exceeding £500, and all his plate, linen, &c. in both his dwelling-houses, and also an annuity of £300 during her widowhood; and which, by his will, he declared to be in satisfaction of all claims and demands she might have upon his real or personal estate, by virtue of a certain deed or paper writing, thentofore signed by him in the Hebrew language (meaning the said marriage articles), or otherwise howsoever; and appointed the said *Aaron Franks* sole executor of his will, who paid Mrs. *Franks* the legacies and her annuity till she died in *January*, 1754.

In 1738, *Hyam Hart*, the only son of *Moses*, died intestate, and unmarried.

In *November*, 1742, the plaintiffs intermarried; and on the 16th of *December* following *Henry Isaac Franks* was found to be a lunatic, and the said *Aaron Franks* was appointed committee of his person and estate.

Mrs. *Judy Levy* survived her husband *Elias*, who left

1759.  
FRANKS  
v.  
MARTIN.

[ 316 ]

1759.  
 ~~~~~  
FRANKS
 v.
MARTIN.

issue by her only one daughter, who died intestate in 1754. Mrs. *Bilah Franks*, wife of the said *Aaron Franks*, likewise died in 1749, leaving *Phila Franks*, and *Priscilla Franks*, the infants, her only two daughters, and no other issue: Mrs. *Adolphus* had no issue.

Moses Hart died in November, 1756, having on the 2d of April preceding made his will, and appointed the said *Michael Adolphus*, together with *Joseph Martin*, and *Lazarus Simons*, executors; by which he confirmed the settlement made on the marriage of his said daughter *Rachael*; and gave life annuities to his three sisters, *Margoles*, the wife of Mr. *Lazarus Simons*, and the defendants, *Judith Hart*, and *Jacobed Hart*, spinsters; and several other legacies and annuities; and chargeable therewith, he gave the *residuum* of his estate to his executors in trust for his two daughters, Mrs. *Levy* and Mrs. *Adolphus*, and the issue of the latter, if she should have any; and after the decease of his said daughters, if Mrs. *Adolphus* should die without issue, then in trust for his three sisters, and the survivors and survivor of them; and after their deceases in trust for the defendants, *Moses* and *Naphtali Hart*, the two sons of his half brother *Solomon Hart*, and their issue; and in default of issue by them, then in trust for his right heirs. In a codicil, noticing the large portions which he had given to his sons-in-law, and the immense sums they had got by his means, and the large estates they would be possessed of, he assigned it as a reason for his not leaving his dear grandchildren (meaning the plaintiffs, *Phila* and her brother, and the daughters of *Aaron Franks*) any legacies, declaring that he always had the greatest love and regard for them, and wished them health and long life that they might live and enjoy their plentiful fortunes.

The bill in the former of the two suits, which was brought by *Naphtali Franks* and *Phila* his wife, who

was the daughter of *Sincha*, set forth the articles, and prayed that they might be carried into execution.

The cross bill was brought by the executors and legatees, under the will of *Moses Hart*, for quiet enjoyment, and that the Hebrew contract might be delivered up to be cancelled ; and also prayed a discovery of an English agreement, which was alleged to be in the custody of the plaintiffs in the first suit. The defendants in the first suit in their answer, and also in their cross bill, alleged, that the paper signed by Mr. *Moses Hart* was only what is called in the Hebrew tongue a *ketuba*, which is an instrument that does not bind the father of the bride, but only the husband ; and there were also allegations of fraud, which, however, were abandoned at the hearing.

The plaintiffs, in their answer to the cross bill, contended that a *ketuba* was an entirely different species of instrument. That the Hebrew instrument in question was called a *shtor* (a), which word in the Hebrew language signifies a *contract*: that the present, as distinguished from other contracts in general, was called a *shtor choxi chelec zachar*, which words in the Hebrew language signify a *contract for half of a male's share*. They examined many witnesses, who proved that it was very common among the German Jews who were engaged in commercial transactions ; and that if a Jew entered into such contract having a son, who afterwards died, the contract was still binding, and the *shtorr'd* daughter and her issue would still be entitled to the share stipulated for by such *shtor*. And that when a Jew entered into a contract of this nature, he could not make any subsequent will even in favour of his wife and children. That the rabbi who drew the contract was a very learned person, and that it had been executed with all the solemnities and

1759.

FRANKS
v.
MARTIN.

[318]

(a) *Vide post.* p. 325, in note.

1759.

FRANKS

v.

MARTIN.

forms necessary to sanction a Jewish contract; and several conversations were proved, in which *Moses Hart* had recognized the contract.

The *Attorney-General*, Mr. *Sewell*, Mr. *de Grey*, Mr. *Wilbraham*, and Mr. *Coxe*, for the plaintiffs.

Judges in all ages have endeavoured to support deeds and wills, and to draw a consistent intention from them, even by transposing words. *Ut res magis valeat quam pereat*. So Lord *Hobart* takes notice, with due commendation, that the judges have been curious, and almost subtle to invent reasons to assist the just intent of the parties (a). *Fish v. Bellamy*, Cro. Jac. 71.

It is the business of courts of justice, and particularly of courts of equity, to enforce the performance of contracts honestly made, and on good consideration as this is, though the instrument be unskilfully prepared. It has sufficient certainty to shew the intent of the parties. It is in the nature of a family settlement like a will, but not revocable. Some parts of the deed are extremely plain, others doubtful; but it is evident from a general view of it, that Mr. *Hart* stipulated to leave his whole personal estate to his children and grandchildren in certain shares and proportions; the only difficulty is to say what those shares and proportions are.

There are many things uncertain in themselves, which by reference to a certainty may be made certain. This rule of construction is put by Lord *Coke*, both in the affirmative and negative, in 5 Rep. 6 a. and 78 a., and again in 9 Rep. 47. *Id incertum est quod nullo modo certum reddi potest, sed id certum est quod certum reddi potest, sed magis certum est quod semet ipso certum est*.

By the Jewish law, a married daughter having received

(a) Earl of *Clanrickard's* case, Hob. 277; vide also 2 Meriv. 323.

a portion at her marriage, was totally excluded from any share in her father's estate, if he died intestate. This instrument was equally necessary to secure the share in case of an intestacy, as against disposition by will. Mr. *Hart* declares his daughters shall be equal, and that *Sincha* shall have half a son's share, what the most beloved son should have. Mr. *Hart*, at the time of making the deed, had a son and four daughters. Suppose he had died without any alteration happening in his family, nothing could have been more clear than the division. The son must have had double the share of a daughter. The estate must have been divided into six shares, two to the son, and one to each daughter.

If in the last clause the word sons should be taken in the singular number, it would reduce the case to the situation of the family at the time of making the deed. In the case that has happened, there is no son, but shall this avoid the deed? and there being no son, it seems more just that the whole should be divided amongst the daughters or their children, because the *shtor* declares that there is to be a strict equality amongst the daughters; and as Mrs. *Franks* was to have an equal share against the claim of the son, *a fortiori*, ought she to have it, when that favoured object was removed? But even if that construction could not prevail so as to give effect to the spirit of the deed against the letter; then in order to conform to the letter, a son must be supposed, and the estate divided accordingly.

Suppose articles on the marriage of a daughter, in which the father contracts that his estate shall be divided between his sons and daughters; if there should happen to be no sons, can it be supposed the deed would be void? Should not the estate be divided amongst the daughters, without leaving it in the power of the father

1759.
FRANKS
v.
MARTIN.

[320]

1759.
 ~~~~~  
 FRANKS  
 v.  
 MARTIN.

to dispose of it otherwise? And rather, because it is a rule of construction, that every man's deed shall be taken most strongly against himself.

There is a strong case to this purpose put by Lord *Bacon*, in his *Maxims of the law* (a). "It is a rule, words are to be understood, that they work somewhat, and be not idle and frivolous: *Verba aliquid operari debent, verba cum effectu sunt accipienda*. And therefore if I bargain and sell you four parts of my manor of *Dale*, and say not in how many parts to be divided, this shall be construed four parts of five, and not of six or seven, &c. because that it is the strongest against me; but on the other side it shall not be construed four parts of four parts, that is, whole of four quarters; and yet that were strongest of all; but then the words were idle and of none effect."

Suppose in the present case there had been two sons, and one advanced with a double share as a beloved son, and four daughters, the shares of the unadvanced son and the daughters must have been equal. Suppose two sons, and neither of them advanced as a beloved son, and four daughters, the estate must have been divided into eight shares, two to each of the sons, and one to each of the daughters. So let the number of sons and daughters be what it will, there must be a sufficient rule to make the division.

[ 321 ]

The instrument is said to be made pursuant to the commands and statutes of their holy law, and the institution of their rabbies of blessed memory, according to the law of *Moses* and *Israel*, and agreeable to the law received on *Mount Sinai*. It may be material, therefore, for a moment, to consider what the Jewish law was

(a) P. 26. Ed. 1803.

with regard to successions, which Mr. *Selden* shews at large in his book *De Successionibus in Bona Defuncti ad Leges Ebræorum*, cap. 23 ; but there is no occasion to resort to the writings of learned men, as the Holy Scripture itself has left a very memorable instance of it in the 27th chap. of Numbers. It was the claim of daughters to the succession of their father's estate, brought before the great Sanhedrim, before *Eleazar* the priest, and before the princes and all the congregation, which made the greatest and wisest court of judicature that ever sat before or since ; for by the princes are meant the heads of the tribes, or the highest of the judges ; and by the congregation is meant the 70 elders, and at the head of all sat *Moses* ; but the land of *Canaan* having, by the command of God, been divided among those only who were numbered, and they being only males, it was apprehended that females might be excluded from having any inheritance among the *Israelites*. This was the ground of what follows : the great assembly before whom the question was brought, did not dare to pretend to give judgment, but referred the cause, by reason of its difficulty, to *Moses*, who, we are told, brought it before the Lord himself ; “ And the Lord spake unto *Moses*, saying, the daughters of *Zelophehad* speak right : thou shalt surely give them a possession of an inheritance among their father's brethren ; and thou shalt cause his inheritance to pass unto his daughters.” (a)

(a) *V.* 6 and 7. The inconvenience which arose from this decision, was afterwards remedied by the command, that daughters should not marry out of their own tribe. *Numb.* c. 36.

This case is cited by Lord *Holt*, in his very elaborate judgment in the case of *Clements v. Scudamore*, 1 *P. W.* 63. 2 Lord *Raym.* 1024. 6 *Mod.* 120. *S. C. Salk.* 243. *Holt*, 140.

1759.  
FRANES  
v.  
MARTIN.

1759.

FRANKS

v.

MARTIN.

This is the greatest and most solemn determination that was ever made concerning property and the rights of succession, and is such as can never be supposed to be out of the mind of any Jew ; and it is reasonable to conclude, that the parties to the instrument in question had it in view at the time when this instrument was made ; and it is therefore reasonable to construe it according to that equitable and high determination of Jewish property.

It would be endless to cite the commentaries upon this passage of Scripture ; they all agree that the Hebrew canon was this. *Grotius*, *Synopsis Criticum*. *Hale*, *Hist. of the Common Law*, c. 11. &c.

The lengths to which courts of equity will go to support deeds and wills, and give them the construction which appears to have been the intent of the parties, appears by *Newland v. Shepherd*, 2 *P. W.* 194. *Pratt v. Jackson*, *ib.* 302. *Uvedale v. Halfpenny*, *ib.* 151. *Forth v. Chapman*, 1 *P. W.* 667. *Hewet v. Ireland*, *ib.* 426. *Langdon v. Goole*, 3 *Lev.* 21.

The *Solicitor-General*, Mr. *Willes*, Mr. *Perrot* and Mr. *Jones* ; Mr. *Herbert*, and Mr. *Wedderburne*, for the different defendants in the first cause,

Contended, that on the contingency which had happened, the fourth article could have no effect, the provision being only in case *Moses Hart* should leave issue male. That it was merely a stipulation to prevent the partiality in favour of sons. That the daughters were all on the same footing. Even supposing Mr. *Hart* had entered into an agreement for the distribution of his whole estate among his children, yet it could only be understood as intended to take place in case of intestacy. The agreement was otherwise unreasonable, as it would preclude Mr. *Hart* from the future disposition of his property. That, moreover, the instrument was so

complicated and obscure, that no construction could be put upon it, which would not be liable to great absurdities and contradictions.

1759.

FRANKS

v.

MARTIN.

*The Lord* KEEPER.

This bill is brought for an account of the estate of *Moses Hart*, and to have a distribution thereof according to an agreement, contained in a Hebrew paper, entered into by Mr. *Hart* and Mr. *Isaac Franks*, on the marriage of the latter with Miss *Sincha*, Mr. *Hart*'s daughter. The bill states the instrument, and does not otherwise specify the agreement, but seeks a specific performance.

The instrument appears to be new in this country, and unprecedented, but it is said to be in use among the German Jews, from which race the parties are descended. It seems, however, not to have acquired any fixed name or certain import amongst those persons that use it. These circumstances are however immaterial to me, who can only take it into consideration as an agreement, and as such am bound to give it effect, if it be a stipulation to do what the laws of this country permit.

As the bill is therefore for a specific performance, I am to consider, *first*, whether the agreement was fairly obtained, *secondly*, whether it be equitable and reasonable, and *thirdly*, whether it be certain. If it have all these qualities, I ought to decree it to be specifically performed; if not, I should leave the parties to their remedy at law.

There are no grounds before me for questioning the fairness in obtaining the execution of this instrument; but I am under very great difficulties to ascertain the import and intent of it, without which it is impossible to say whether the agreement is hard and unreasonable or otherwise; and of consequence entitled or not entitled to the aid of this court.

1759.  
 ~~~~~  
 FRANKS
 v.
 MARTIN.

The plaintiffs contend, that it was intended to be a fixed appointment of the share the daughter was to have in the personal estate which the father might die possessed of, and to control his power of making a will, and to secure to her half a share of his most beloved son.

When the father was to be stripped of his power of making, by the benevolence in his will, the distinction of his paternal affection, there was wanting some rule to which this stipulation in favour of the daughter was to refer; and therefore it was said, that it referred to the succession *apud Hebræos*, where the elder had a double portion; but this construction is repugnant to the words and context, which plainly refer to the father's power of giving a preference.

But, however, there being no son living at the death of the father, there was no rule to which the first clause could be applied; resort therefore was had to the last, and it was said, the sons were to have two shares, each daughter half of a son's, and consequently his intent being that the daughters should be equal, that the estate was agreed, if there were no sons, to be divided among them. This too is repugnant to the former clause, because here the shares of the sons are fixed: the former supposes a power in the father to distinguish them.

The defendants say, that the instrument was designed to answer two events, neither of which have happened; a will made in favour of a surviving son, or an intestacy where there was a surviving son; but I see no reason to say that was the intent.

The more plain and obvious sense seems to be, that Mr. *Franks*, guarding against Mr. *Moses Hart's* suspected inclination to imitate the Jewish succession, and make the sons his principal heirs, stipulates that the daughters shall have half a share of the best preferred

son. In that case, Mr. *Hart* does not oblige himself to give any proportion to a son, half of which should be a benefit to this daughter. Nor is there an intimation, that the whole which she receives at all times from the father's estate, shall exceed half a son's share.

The words of this instrument being unintelligible in themselves, the plaintiffs read evidence to explain it; but the witnesses give as little satisfaction as the instrument. They say it is called a (a) *Shtor*, or marriage bond used

(a) Though this word is throughout the present case, and in the printed cases before the Lords, spelt *Shtor*, yet it is clearly shewn, by Mr. Justice *Blackstone*, 4 Com. 266, and by the authorities which he refers to, that the word is properly *Shetar*, which the Jews, according to *Selden*, pronounced *Starr*. From whence Mr. Justice *Blackstone's* ingenious conjecture as to the etymology of the word "Starchamber," as being the room where the Jewish contracts, in obedience to the ordinance of *Richard 1st*, were deposited. It properly signifies a covenant, but seems applied to any writing executed with solemnity. *Selden*, in the *Uxor Ebraica*, 584, et seq., gives the form of a certificate of the proper ceremonies having been complied with,

on the occasion of a brother's refusing, on the citation of the widow, to raise up seed to a deceased brother, whereby the widow having (according to the direction in *Deuteronomy*, ch. 25, v. 7), loosed his shoe from off his foot, and spitten in his face, is permitted to marry a second time. He says, *vocatur item Shetar Chalitza, id est, contractus scriptus de calceo exuto. Et Judæi Anglienses ex voce illâ Shetar, Starrum fecere, unde sexcenties in tabulis Henrici Tertii ac Edwardi primi regum publicis, "N. Judæus per starrum suum recognovit."* In the Titles of Honour, p. 798, et seq., there is a copy of a Hebrew instrument, which is called a *shetar* or *starr*, taken from the records in the Exchequer, which is a release from a Jew of *Lincoln*.

Mr. *Christian*, in a note to

1759.
FRANKS
v.
MARTIN.

1759.
 FRANKS
 v.
 MARTIN.

by the German Jews: that it is to secure to a married daughter half a share of a son, beyond what she receives down, as a portion: that it ties up the father from making a disposition by will; and some say in his lifetime. But though they have known similar instruments made, I do not find that they know of any effect they have had, or of any distribution pursuant thereto. If the witnesses are of the species of the drawers of these deeds, they are the most ignorant of men, and destitute of the capacity of putting their ideas in writing.

The instrument does not import in any part of it that the addition shall be half the son's share, exclusive of the sum advanced; and such construction is so absurd, that no court can be justified in saying that it was the intent of the parties, unless it was expressly and without ambiguity so declared. Besides, to say that the party voluntarily abdicated his power of devising, and disabled himself from providing in that way for his wife and children, is shocking.

Upon the whole, from the strictest examination of this instrument, I cannot extract any consistent meaning; and therefore I must dismiss the bill. I do think, notwithstanding the boasted learning of the rabbies, who were said to have prepared it, that there is not an attorney from *London* to the *Land's end*, who would have drawn so senseless and inconsistent a settlement (a).


Bills in both causes dismissed without costs.

Affirmed on appeal to the *House of Lords*, 11th March, 1760. 5 Bro. P. C. 151. Ed. Toml.

the above passage, notices the word as twice used in some ancient statutes of the University of *Cambridge*, for a schedule or inventory.

(a) See the grounds upon which courts of equity refuse their assistance to compel the execution of ambiguous and uncertain contracts, explain-

ed by Lord *Redesdale*, in both at law and in equity for
Harnett v. Yeilding, 2 Sch. uncertainty, *Jurid. Arg.* p.
and *Lef.* 548. *et vide Mosely* 168, 169, and 4 *Ves.* 283,
v. Virgin, 3 *Ves.* 184. *Bozon* 284; and see Lord *Loughbo-*
v. Farlow, 1 *Meriv.* 459. See rough's observations in the
also Mr. *Hargrave*'s argument case of Lord *Walpole v. Lord*
in the *Thellusson* causes, where *Orford*, 3 *Ves.* 419. As to
several precedents are collect- the doctrine respecting wills
ed, to shew that contracts, void for uncertainty, *vide*
deeds, wills, and instruments *Mason v. Robinson*, 2 S. and
of every sort, may be rejected S. 295.

1759.

FRANKS
v.
MARTIN.

HENNAND v. MOORE.

VERNON v. MOORE.

MOORE v. MOORE.

30th March, 5th
& 12th May,
1759.

(*Reg. Lib. A. 1758. fol. 325 (a)*).

THIS was a re-hearing upon a decree of Lord *Hard-*
wicke's, made in these causes, on the 23d of *June*, 1756.

John Moore, by his will, bearing date the 26th of
September, 1713, devised certain leasehold premises,
which he was possessed of for the residue of a term of 99
years, situate in the parish of *St. Martin in the Fields*,
in the county of *Middlesex*, to his nephews *John* and
Thomas Moore, their executors, administrators, and as-
signs, (the latter of whom was a defendant in these
causes,) to take as joint tenants and not as tenants in com-
mon; afterwards, by indenture, bearing date the 6th of
September, 1720, they made a partition of the premises.

On the 24th of *November*, 1725, the said *John* and
Thomas Moore executed a joint bond to *Samuel Stanton*,
for the sum of £500.

Where premises
had been sold
under a decree,
held that the lien
of an incum-
brancer was not
transferred to the
purchase-money,
so as to be out of
the registry act;
and he was there-
fore postponed to
subsequent in-
cumbrancers.

(a) The statement of the original hearing. A. 1755,
cases is in the entry of the fol. 593.

1759.

HENNAND

v.

MOORE.
VERNON

v.

MOORE.
MOORE

v.

MOORE.

And by indenture of the same date, made between the said *John* and *Thomas Moore* of the one part, and the said *Samuel Stanton* of the other, reciting the said bond, and that the said *John* and *Thomas Moore* were possessed of the said premises for the residue of the said term, they covenanted, that in default of payment of the said sum of £500, the said premises should stand as a security for the same; and that they would, on request, execute a mortgage of the said premises, to secure the said sum of £500. This deed was never registered.

John, by his will, bearing date the 2d of *December*, 1727, (*inter alia*) devised the said leasehold premises to his brother, the defendant, *Thomas Moore*, in trust by sale or mortgage, or by the rents and profits of the same, to pay all his just debts; then to pay £20 to his wife, to his son *John* £4000, to his son *Charles* £3000 at twenty-one; and if his children should all die before their legacies should become payable, he devised the premises to his said brother *Thomas Moore*, whom he made his executor.

The nephew and executor of *Samuel Stanton* in *Michaelmas* term, 1743, obtained two judgments against the defendant *Thomas Moore*, one in his own right, and the other as executor of his brother *John*.


Upon the marriage of the plaintiff, *Rebecca Hennand*, then *Rebecca Moore*, the eldest daughter of the defendant *Thomas Moore*, by indenture, bearing date the 20th of *March*, 1741, reciting, among other things, that the said *Thomas Moore* was entitled to the said leasehold messuages, the said *Thomas Moore* assigned and transferred a messuage or tenement therein particularly mentioned, part of the said premises, to trustees, &c. as a provision for the children of that marriage, and in default thereof to the husband absolutely. By a proviso, reciting, that as the said *Thomas Moore* was entitled to the

premises contiguous to it, which were intended to be sold, &c. it was agreed, in case the said *Thomas Moore* should be minded to sell the same, that then, if the said *Thomas Moore* should pay to the said trustees the sum of £1000, the said assignment should be void.

By a decree, made 23d *June*, 1741, in two causes brought by certain mortgagees, the premises were directed to be sold; and that after payment of the several mortgages, the residue of the purchase-money should be paid to the said *Thomas Moore*. *Charles Moore* being reported the best purchaser of the premises, at the sum of £22000, an order was made on the 15th of *May*, 1752, to confirm the Master's Report; and by another order, made on the 23d of *March*, 1753, he was directed, on payment of the residue of the money, to be let into possession, and receive the rents from *Christmas* last past, and that the receiver should be discharged. *Charles Moore* had notice of the said *Rebecca Hennand's* claim to £1000 under her marriage settlement, and husband's will, by which it was left to her, and his death without issue.

By indenture, bearing date the 28th of *July*, 1752, between *Thomas Moore* of the first part, *Rebecca Hennand* of the second part, and *Charles Moore* of the third part, reciting, that *Charles Moore* had been reported the best purchaser at the sum of £22000; that the debts amounted to about the sum of £18000; that the said *Rebecca Hennand* had lent him, the said *Thomas Moore*, the sum of £130; that he had received a legacy belonging to *Charles Moore* of £1000, which, together with interest, and some other sums lent to him, amounted to the sum of £1923; the said *Thomas Moore*, after payment of prior liens and incumbrances, thereby charged the rents and profits, and surplus purchase-money, with the said several sums.

By another indenture, bearing date the 17th of *April*,

1759.

 HENNAND
 v.
 MOORE.
 VERNON
 v.
 MOORE.
 MOORE
 v.
 MOORE.

1759.

HENNAND

v.

MOORE.

VERNON

v.

MOORE.

MOORE

v.

MOORE.

1753, between the said parties, the said *Thomas Moore* reciting the former transactions, appointed the debts of the plaintiff *Rebecca Hennand*, and *Charles Moore*, to be paid out of the rents in the receivers' hands, or the arrears in the tenants' hands, as far as he was able to make them over in law or equity.

On the 28th of *July*, 1753, the bond and indenture of the 24th of *November*, 1725, together with two judgments, which had been obtained in *Michaelmas* term, 1743, were assigned by lady *Charlotte Rich*, the representative of *Stanton*, to the defendant *Jones*.

Upon the hearing of these causes, on the 23d of *June*, 1756, before Lord *Hardwicke*, his lordship (among other things) decreed, that an account should be taken of what was due, and that the creditors should be paid in the following order: First, what was due to Mrs. *Hennand* for principal and interest, upon the sum of £1000, secured by her marriage settlement; secondly, what was due to her and the other creditors under the deed of appointment; and thirdly, what was due to the defendant *Jones*, who now petitioned for a re-hearing.

The *Solicitor-General* and Mr. *Sewell*, Mr. *Capper* and Mr. *Sayer*, for the defendant *Jones*,

Contended, that the sale being made by confirming the Master's Report of the best purchaser, the registry act was out of the case; that the sale transferred his lien to the purchase-money, and then his lien became a conveyance not within the act, and took effect as an equitable lien, prior in point of time to the plaintiff's, Mrs. *Hennand*.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Bonner*, for the plaintiff, Mrs. *Hennand*; Mr. *Serj. Hewitt* for the defendant, *Charles Moore*.


The Lord KEEPER

Was of opinion, that the priority of the defendant

Jones was founded on a latent deed, which ought to have been registered; and that from the laches and conduct of those under whom he claimed, he had forfeited all priority in this court, and that as the deed was within the registering act, was void against the plaintiff (a).

Decree affirmed.

(a) As to registration, *vide Sheldon v. Cor*, post. Vol. II. 224.

1759.

 HENNAND
 v.
 MOORE.
 VERNON
 v.
 MOORE.
 MOORE
 v.
 MOORE.

WAKE v. CONYERS. 43 Ch. D. 526

(Reg. Lib. Min. Trin. 1759.)

1759.
 16th June.
 S. C.
 2 Cor, 360.
 Hill's MSS.
 Bill to ascertain the boundaries of two manors dismissed, there being no dispute as to the soil.

THE defendants, *John Conyers*, Esq. as tenant for life, his wife, Lady *Henrietta*, as entitled after his death to her jointure, and his son an infant, as tenant in tail, were entitled to the manor of *Epping*, and also to the freehold of certain lands next adjoining to it, lying in the manor of *Waltham*; the boundary lines of the two manors passing through Mr. *Conyers's* park. He had cut down certain trees, which, it was alleged by the bill, were standing on the line, and were boundary marks.

The present bill was filed by Sir *William Wake* as *prochein amy* to his three infant sons, who were tenants in tail successively of the manor of *Waltham*, praying that the boundary of the manor of *Waltham*, so far as the same abuts on the manor of *Epping*, might be fixed and set out, and that a commission might issue for that purpose, and that the defendant *John Conyers* might set up new boundary marks in the room of those which he had cut down and destroyed.

Mr. *Conyers* by his answer admitted the cutting down

1759.

WAKE

v.

CONYERS.

19th May.

of certain trees, but denied that they were the boundary marks, though he submitted to have the boundaries ascertained and settled, and that marks might be set up to perpetuate such boundaries.

On the opening the *Lord Keeper* objected to the nature of the suit, as being merely to settle the boundaries of the manor: he said he did not think the court had jurisdiction, and desired it to stand over for counsel to consider whether there was sufficient equity for the court to entertain the bill. It came on again this day.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Browning*, for the plaintiffs.

This is not merely a bill of peace; though, as far as the jurisdiction of this court is concerned, it is usual and proper to establish peace and good neighbourhood. But it is a case peculiarly coming under the most favourable jurisdiction of this court; which is to give a remedy where there is none at law. The law is defective. The boundary cannot be set out. It can only be tried by actions of trespass or ejectment, which can do no more than settle the local trespasses; while a boundary line extending a mile or two may be disputed inch by inch.

There is no objection to this bill, as being merely a bill to settle boundaries. Bills to settle boundaries have been entertained in this court from very ancient times, *Tothill*, 126, 127; so early as the reign of *James the 1st.* *Ib.* 84. 210. *Bowman v. Yeat*, cit. 1. Ch. Ca. 146: there was a rent-charge, and the grantee did not know where to distrain on account of the confusion of boundaries; a commission was ordered. So *Harding v. Countess of Suffolk*, *Rep. Can.* 63. *Cocks v. Foley*, 1 *Vern.* 359. In the case of the Duke of *Dorset v. Serj. Girdler*, *Prec. Can.* 531, a demurrer to a bill to perpetuate testimony on the ground of a menace being used to disturb plaintiff in sole fishery overruled, and on

this ground, because he could not proceed at law. So in this case what is prayed by the bill cannot be done at law. The defendant has destroyed the last remaining boundary marks, and by his answer consents that they may be set out.


The only difference between this and the common case is, that there is no dispute about the soil, which is confessedly Mr. *Conyers's*, and it may be asked upon that, *cui bono* to fix the line? The answer to that is the manorial rights: a manor has a seignory: lands escheat: the lord has a right to treasure-trove, to deodands, to the game. The only difference then is the value. In 100 years' time the boundaries will be confounded and lost, unless this commission be granted.

Mr. *Perrot* and Mr. *Hoskins* for the defendants.

This bill, under pretence of establishing boundaries, is, in fact, to settle manorial rights. It is said that every question for the settling of boundaries is a proper subject for the jurisdiction of this court. That is, however, not the case. Those cases which have been cited, in which a man, having joint occupation, has confounded the boundaries, have turned upon the fraud, which has been relieved against. A similar principle has given the court jurisdiction in the cases of rent charge. As to the loss of evidence, if any injury arises to the plaintiffs from that, it will be from their own laches, in not making perambulations. This does not come under the common case of issues, where enjoyment is decreed accordingly. It is an incorporeal hereditament, and that cannot be done.

The Lord KEEPER.

This bill is merely for the ascertaining the boundaries of these two manors, and is intended to bind the inheritance of the parties for ever. It struck me as new upon the opening. I have been ever since I sat here extremely jealous of the jurisdiction of this court over

1759.

 WAKE
 v.
 CONYERS.

1759.

WAKE

v.

CONYERS.

legal inheritances. I was therefore desirous that some precedent should be produced to shew me that this court could entertain a bill of this nature to settle the boundaries of an incorporeal inheritance: but none such has been produced. There have, since I sat here, been several to fix boundaries where a right to the freehold of the soil has been incidental. But I have seen such frightful consequences arising from them, that I think these suits are very far from deserving encouragement. They originally came into this court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they apprehended, and which they were brought to prevent, had actually been tried at law.

Hitherto these disputes have been only between persons of great fortune. But the consequences have been, that the parties have been eager to come into this court, without any attention being paid to see whether the prayer of the bill applies properly to the jurisdiction. An issue is directed, and after going down to the assizes at a very great expence, and a verdict being found for one party, the other is dissatisfied, and a new trial is directed. I was extremely unwilling to grant the last new trial in the case of the *Earl of Darlington v. Bowes* (a): but on inquiring of the bar whether there was any instance of a decree made upon one verdict only, none could be produced, and if there were any, they were so few that they could not be remembered. I therefore thought myself bound by the current of opinions to grant it. But I am determined, if any such case should ever come before me again, to consider it in a different light, and to have the matter more fully inquired into; and prevent, if possible, an expence which is a reproach to the law.

All the cases where the court has entertained bills for establishing boundaries, have been where the soil itself

(a) *Ante*, p. 270.

was in question, or where there might have been a multiplicity of suits (*a*). This court has, in my opinion (and if parties are not satisfied they have resort elsewhere), no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud; or confusion, where one party has ploughed too near the other, or the like: nor has this court a power to issue such commissions of course as here prayed.

In this case it is said there is no legal remedy, and therefore there must be an equitable one; but this does not follow unless there is an equitable right. If there is a legal right, there must be a legal remedy; and if there is no legal right, there can in this case be no equitable one (*b*).

(*a*) As to the doctrine respecting bills of peace, *vide How v. the Tenants of Bromsgrove*, 1 *Vern.* 22. *New Elm Hospital v. Andover*, *ib.* 266. *Weekes v. Staker*, 2 *Vern.* 301. *Arthington v. Fawkes*, *ib.* 356. *Brown v. Vermuden*, 1 *Ch. Ca.* 272. *City of London v. Perkins*, 3 *Bro. P. C.* Ed. *Toml.* 602. *Cowper v. Clerk*, 3 *P. W.* 155. *Mayor of York v. Pilkington*, 1 *Atk.* 282. *Conyers v. Lord Abergavenny*, *ib.* 285. *Lord Teynham v. Herbert*, 2 *Atk.* 483. *Whitchurch v. Hide*, *ib.* 391. *Welby v. the Duke of Rutland*, 2 *Bro. P. C.* Ed. *Toml.* 39. *Bouverie v. Prentice*, 1 *Bro. C. C.* 200. *Dilly v. Doig*,

2 *Ves. jun.* 486. *The Attorney-General of the Prince of Wales v. St. Aubyn, Wightm.* 167. *Devonshire v. Newenham*, 2 *Sch. & Lef.* 199.

(*b*) But there are some cases where the court will interpose, though the right is merely legal, as in the *Duke of Leeds v. Powell*, 1 *Ves.* 171, where the plaintiff had a right to the rents of a manor as grantee of the crown, but had no remedy at law, as there were no demesne lands on which to distrain. See also *Duke of Leeds v. Corporation of New Radnor*, 2 *Bro. C. C.* 518, and the cases there cited.

1759.

WAKE
v.

CONYERS.

All the cases where the court has entertained bills for establishing boundaries, have been where the soil itself was in question, or there might have been a multiplicity of suits.

Commissions to fix boundaries of legal estates, are not of course; there ought to be some equitable circumstance for the court to lay hold of.

1759.

WAKE
v.
CONYERS.

It is said, that in some future time there may be a casual right, such as escheat, treasure-trove, &c.: but am I to countenance such a suit as this before there is any such right, merely because it may happen; though, when it does happen, it may, perhaps, be such a right as the parties will not think it worth their while to contend for?

If I were to make this a precedent, it would be in effect to issue commissions to settle boundaries all over the kingdom. For if of manors, why not of honours, of hundreds, and all other inferior denominations of districts? I shall always, while I have the honour to sit here, be very attentive to prevent the subject from great waste of expense about matters by no means adequate to it. Should I entertain such a bill as this, I should put it in the power of every opulent lord of a manor to distress, if not ruin, not only a poor man, but even a man of moderate fortune, whose estate happens to border upon his; for these suits are often attended with £2000 or £3000 expense; a dishonour to justice.

In order to give this court jurisdiction, there must appear some equitable circumstances in the case. I know of no boundary marks to a manor in another's soil. The trees were Mr. Conyers's own; he had a right to cut them down, and if the plaintiffs are afraid of losing in the course of time the evidence of the boundaries of their manors, they may preserve it by perambulations as often as they please. But I cannot fix the limits of a legal right (if any), unless the jurisdiction of this court is superinduced by some equitable circumstances, which it is not in this case.

Another consideration is, that the plaintiffs are infants, and so is one of the defendants; and shall I send the infant plaintiffs beforehand, when they knew not the value of their estate, to bind the inheritance *quia timent*,

under the protection of the father, who is not privy in estate to them?

I am well satisfied that this bill ought to be dismissed.

1759.
WAKE
v.
CONYERS.

The granting commissions to ascertain boundaries, is a very ancient branch of equitable jurisdiction. *Mullineux v. Mullineux*, *Toth.* 101. *Peckering v. Kempton*, *ib.* *Dean of Windsor v. Kinnersley*, *ib.* 126. *Spyer v. Spyer*, *Nels. Rep.* 14. *Boteler v. Spelman*, *Finch. Rep.* 96. *Wintle v. Carpenter*, *ib.* 162. *Glynn v. Scawen*, *ib.* 239. But the courts have been always very cautious in the exercise of it. *Davenport v. Bromley*, *Finch. Rep.* 17. *Hungerford v. Goreing*, 2 *Vern.* 38. *Bishop of Ely v. Kenrick*, *Bunb.* 322. *Metcalf v. Beckwith*, 2 *P. W.* 367. *Loker v. Rolle*, 3 *Ves.* 4. It is therefore necessary to suggest some equitable circumstance, as that fences have been thrown down, boundaries ploughed over, &c.; or, to use the more precise language of Sir *W. Grant*, 2 *Meriv.* 418, who expressly affirmed the doctrine of Lord *Northington* in the present case, the court has no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of the parties. *Rous v. Barker*, 4 *Bro. P. C. Ed. Toml.* 660. See the *Duke of Leeds v. Earl of Stafford*, 4 *Ves.* 180. *Ambler's case*, *cit. ib.* *Attorney-General v. Fullerton*, 2 *V. and B.* 263. And it has always been refused, in the case of manors and parishes. *St. Luke's v. St. Leonard's*, 1 *Bro. C. C.* 40. *Atkins v. Hatton*, 3 *Anstr.* 387. *Winterton v. Lord Egremont*, *cit. ib.* *Speer v. Cramter*, 2 *Meriv.* 410.

1759.

25th May, and

18th June.

S. C.

Amb. MSS.

Sewell, MSS.

CARPENTER v. HERIOT.

(Reg. Lib. A. 1758. fol. 395.)

A father having advanced a child in his infancy, upon his coming of age, takes a bond from him to a greater amount than the sums advanced; held, the bond obtained by parental influence, and decreed not to stand as a security for the sums advanced, but to be set aside altogether.

Loose expression in a letter from the son, held not to be a confirmation.

COLONEL CARPENTER, by his marriage articles dated the 15th of *May*, 1717, covenanted with trustees, that *Harriet Thornbury*, his intended wife, should have the interest of £4000 for her separate use, and after her death, if he survived her, that it should be paid to him for life, and then be paid to and amongst such child or children as should be born, by the said *Robert Carpenter* on the body of the said *Mary Thornbury* begotten, in such proportions as the survivor should, by writing or will, direct or appoint; and for want of such appointment, in equal proportions to and amongst such child or children, if more than one, &c.

The plaintiff was the eldest son of the above marriage: his father had purchased several commissions in the army for him whilst he was under age, the price of which amounted to £2100. He afterwards procured his son to execute a bond, dated the 29th of *September*, 1744, for £7000, conditioned for the payment of £3500 on the 29th of *September* following. *Colonel Carpenter*, who had been very extravagant, and spent the whole of his fortune, by his will, dated the 27th of *March*, 1745, reciting his marriage articles, and taking notice that all his children, except the four youngest were provided for, gave the bond to the plaintiff on condition that he made over certain reversionary interests, which he was entitled to under the will of *Major Edwards*, to the younger children; if not, the bond was to go for the benefit of the younger children.

The bill prayed that the bond might be delivered up, or stand as a security for the money advanced by the father, antecedent to the bond.

The answer of the defendant *Heriot*, who had married one of the daughters of Colonel *Carpenter*, set forth a letter which he had received from the plaintiff, in answer to one in which he had expressed his intentions of paying his addresses to his sister, in which the plaintiff said that his sister would be entitled to £500 upon the death of a relation.

The *Solicitor-General* and Mr. *Sewell* for the plaintiff.


The *Attorney-General* and Mr. *de Grey* for the defendants.

The father's condition is impeached by a favourite son, who wants to set aside a pious act done for the residue of a family who are dependent on him. This transaction is not to be considered in the light of a common money bargain between two persons unrelated. Colonel *Carpenter* had wasted the best part of his fortune by living beyond his income: he therefore calls upon his son to stand in *loco parentis* towards his unprovided children. It is a voluntary bond, which this court will not set aside for the obligor himself. But even supposing it to be a transaction of a nature that the court would relieve against, the subsequent acknowledgement of it in the letter to Mr. *Heriot* must operate as a confirmation. *Lord Chesterfield v. Janssen*, 1750 (a).

The Lord KEEPER.

The question in this case is no more than this: A father advances one child in his infancy; he then, upon the child's coming of age, calls upon him to give him an absolute bond for £3500 payable within one year; the sum in the condition being £1400 more than the father

(a) 1 *Atk.* 301. 2 *Ves.* 125.

1759.

 CARPENTER
 v.
 HERIOT.

18th June.

1759.

~
 CARPENTER
 v.
 HERIOT.

pretended ever to have advanced; whether this bond should stand in equity for the whole sum, or as a security for any money advanced?

It has been said that this is a reasonable transaction. The father had spent his fortune; he calls on the only son that he had established in life, to stand in *loco parentis*, and to supply his father's extravagance, and provide for his brothers and sisters, or to go to gaol. Nay, it was said, that it is the duty of the eldest son to employ his labours to supply the duty of the father, and provide for his brothers and sisters.

Were I to adopt this reasoning and equity, I should give to the paternal authority that of the old Roman law, a power of vendition of his children, contrary to that natural equity which raises no *debitum* between brothers and sisters, and which is acknowledged by the municipal law here, which notes the paternal, not the collateral obligation.

But if an agreement between father and son for the son (without any consideration moving from the father) to provide for his brothers and sisters, could be supported in equity; it must be such a one as the son at the time of entering into, was capable of carrying into execution. How is this? It is an agreement not to make any reasonable provision for his brothers and sisters, but for his father to throw him into gaol when he pleases. There is not a pretence that he could have satisfied the condition of this bond. But, besides, there is no proof that any such agreement was intended; the bond is for money payable at a short time, absolutely.

But then, it is said, suppose the bond without consideration and voluntary, this court will not set it aside: it is certainly true, that if the obligor gives a voluntary bond, and never complains of any imposition or hardship in obtaining it, this court will only postpone it to cre-

ditors, and not set it aside for other volunteers. Nay, if it be given with advice and deliberation, this court will not set it aside for the obligor.

But if a man gives a voluntary bond for more than he is able to pay, the transaction speaks weakness on one side, and a sort of imposition on the other. And this court would have but little equity, to support a transaction so much against conscience.

But, however, this is not the case of a voluntary bond. It is plain by the proof, that the money advanced by the father was represented to the son as the consideration. Now I am of opinion that it was none. For the purchase of the commissions was a gift to the son, as much as if the father had purchased an estate in the son's name. And therefore when the plaintiff, on the father's representation, considered this as a debt, he yielded to paternal authority, and was deceived, and against such deceit ought to be relieved in this court.

It has however been said, that the son has confirmed this since the father's death; and there are many cases where subsequent confirmation of an agreement shall bind. And Mr. *Spencer's* case with Sir *Abraham Jansen* was mentioned. But the present differs materially from that case. There, the contract was only voidable *pro tanto* for the excess. This is *ab initio* void in a court of equity. It was a mistake on one side, and an imposition on the other, there not being a grain of consideration from the father.

The confirmation here, too, is only fished out from a loose expression in a letter, which might not be applicable to this matter. Mr. *Spencer's* was a solemn confirmation by a new bond. Here the expression does not go so far as to say he intended to make the void obligation good. But he only says that, upon the death of some relation (not mentioning expressly this relation, upon whose death

1759.

CARPENTER

v.

HERIOT.

1759.

CARPENTER
v.
HERIOT.

the contingent interest was to descend), his sister might be entitled to £500 (a).

It appears to me that this bond was obtained by paternal influence (b). I am therefore of opinion that it ought to be cancelled, for as nothing was lent, there is nothing for which it can stand as a security.

(a) As to the doctrine respecting Confirmation, *vide* *Blackborne v. Edgley*, 1 *P.W.* 600. *Blunden v. Barker*, *ib.* 634. *Morris v. Burroughs*, 1 *Atk.* 398. *Cocking v. Pratt*, 1 *Ves.* 401. *Tendril v. Smith*, 2 *Atk.* 85. *Heron v. Heron*, *ib.* 160. *Young v. Peachy*, *ib.* 254. *Glissen v. Ogden*, *cit. ib.* *Hawkes v. Wyatt*, 3 *Bro. C. C.* 156. As to family agreements, *vide* *Wycherley v. Wycherley*, *post.* Vol. II. 175.

(b) As to the undue exer-

1759.
18th June.


HATCH v. MILLS. MILLS v. GRIMSTEAD.

(*Reg. Lib. A. 1758. fol. 428.*)

Residue of testator's estate directed to be invested in government securities, and the interest paid to his wife, and after her death to be sold, and the money thereby arising to be divided amongst his daughters and grand-children: held, that the share of a daughter dying in the lifetime of the wife was vested.

JAMES HATCH by his will, bearing date the 2d of July, 1755, after giving the sum of £2000 to each of his four daughters, and several other legacies and annuities, directed that all the remainder of his estate and effects should (as soon after his death as convenient) be got in, and invested in government securities in the names of his wife and the defendant *Mills*; and that his wife should

have the whole yearly interest thereof, during her life, for her own use; and directed that she should have the full power to dispose of, by her will or otherwise, the full sum of £2000, part of such his residuary estate, unto such of her children or grandchildren as she should think proper; and the residue of his estate and effects over and above the said £2000, he directed should, after his said wife's death, be sold for the best price that could be got for the same (except so much thereof as would be sufficient, by means of the yearly interest, to pay his daughter *Jane White* an annuity of £30 during her life, and an annuity of £10 to her daughter until she came of age, and then to pay her £100); and all the money then afterwards thereby arising, he directed should be divided into five equal shares among his four daughters, *Mary Hatch*, *Elizabeth Mills*, and *Sarah* and *Rebecca Hatch*, and his two grandchildren the plaintiffs, the son and daughter of his late son *James Hatch* deceased, in case they, or either of them, attained the age of twenty-one; but if either of them died before that age, the survivor was to have the share of him or her so dying: if both died before that age, no representative or next of kin of them, except his own family, should have any benefit thereby; but that all the monies thereby given to the plaintiffs should return to his said four daughters or their child or children equally; and, for that end, their share or proportion should remain until they or one of them should attain the age of twenty-one years. And in case of the deaths of any of his said four daughters, then the child or children of any one or more of them so dying, should have the share of her or them so dying, in equal shares. And the testator directed, that immediately after his daughter the said *Jane White's* death, in case she should survive his said wife, and the payment of the said £10 a year to her daughter, and the said £100 in money, that

1759.

 HATCH
 v.
 MILLS.
 MILLS
 v.
 GRIMSTEAD.
 [343]

1759.

HATCH

v.

MILLS.

MILLS

v.

GRIMSTEAD.

[*344]

all such part of his said residuary estate and effects as should have been laid out for the paying to her the said £30 *per ann.*, should be sold for the most money that could be got for the same; and all the monies thereby arising divided into five equal parts in manner before mentioned.

Mary Hatch, who married the defendant *Kirkman*, having died in the lifetime of the mother without issue, one of the questions in these causes was, whether, under the above will of her father, her share of the residue of his personal estate vested in her mother's lifetime?

Mr. *Perrot*, Mr. *Willes*, and Mr. *Sayer*, for the plaintiffs, contended, that as the daughters were already provided for by the portions of £2000 each, the *residuum* was intended to be confined to the children and grandchildren, to take by way of cross remainders; that the words, "if any of my daughters die," were to be construed, "if any of my daughters die, living my wife"; that nothing was given to them absolutely, but it was merely a direction to the trustees how to dispose of what might happen to be the residue on the mother's death. They also cited *Fenhoulet v. Passavant (a)*, 8th and 9th *March*, 1754.

(a) There is no report of this case in print, though there is a short note of a point of practice which arose in the cause, 2 *Ves.* 24. The following is taken from a copy of the MS. reports of Lord C. J. *de Grey*, in the *Hargrave* papers. Mus. Brit. His lordship has prefixed a *Qu.* to it.

Testator directed his exe-

cutors to pay the interest of £1000 stock to his son *Moses Ferment* for his life, and in case he leaves at his death one or more children, to pay the interest for their maintenance, &c.; and in case he had no children, to be divided, and two-thirds to be paid to *Josias le Conte* and *Jane* his wife, and the other one-third to be paid to *George*

The *Attorney-General* and *Solicitor-General* for the defendant *Kirkman*.

The Lord KEEPER

Was of opinion that the residue vested in the daughters during the mother's life; and accordingly decreed to the defendant *Kirkman* the share of his deceased wife (a).

1759.
HATCH
v.
MILLS.
MILLS
v.
GRIMSTEAD.

Wildy and *Judith* his wife, and their children and representatives. At the death of the testator, *G. Wildy* had two children then living: *George* died; then one of the children, then the wife, and then *Moses Ferment* died without issue. Plaintiff, the only child of *G. Wildy*, claimed the one-third of the £1000: first, as being given to *G. Wildy*, and all his children living at the testator's death, as joint tenants, of which he was survivor: and, secondly, if that is not the intention, then as being given not to vest till the death of *Moses Ferment*, and then to vest in such of the persons, *G. Wildy* and his children, as should be then living. The defendant, the representative of the wife, claimed it as being given jointly to *George* and her, and that if they were dead to their children; so that the children were only to take supplement-

ally, and that she by surviving her husband was entitled: contending that it vested on the death of the testator. But it was held, *per curiam*, that it did not vest till the death of *Moses Ferment* without issue.

(a) Where time is annexed to the substance of a legacy, it does not vest before the period mentioned. *Spink v. Lewis*, 3 Bro. C. C. 355. *Spencer v. Bullock*, 2 Ves. jun. 687. *Machell v. Winter*, 3 Ves. 536., reversing *ib.* 236. *Batsford v. Kebbel*, *ib.* 393. *Reeves v. Brymer*, 4 Ves. 692. *Hanson v. Graham*, 6 Ves. 239. *Daniell v. Daniell*, *ib.* 297. *Elwin v. Elwin*, 8 Ves. 547. *Faulkener v. Hollingsworth*, *cit. ib.* *Sansbury v. Read*, 12 Ves. 78. *Bernard v. Montague*, 1 Meriv. 422. But where, as in the present case, the bequest is independent of the time mentioned, but payment is deferred,

1759.
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 HATCH  
 v.  
 MILLS.  
 MILLS  
 v.  
 GRIMSTEAD.

[ 346 ]

either on account of some interest in the subject being given to a person on whose death the gift is to take effect, or of some difficulty attending the collecting the testator's effects; the legacy is considered as vested at the death of the testator. *Pinbury v. Elkin*, 1 P. W. 563. *Love v. L'Estrange*, 5 Bro. P. C. Ed. Toml. 59. *Tunstall v. Bracken*, Amb. 167. *Medlicott v. Boves*, 1 Ves. 207. *Dawson v. Killet*, 1 Bro. C. C. 119. *Jeale v. Tichener and Clarke v. Ross*, cit. *ib.* *Barnes v. Allen*, *ib.* 181. *Monkhouse v. Holme*, *ib.* 298. *Attorney-General v. Crispin*, *ib.* 386. *Benyon v. Maddison*, 2 Bro. C. C. 75. *Scurfield v. Homes*, 3 Bro. C. C. 90. *May v. Wood*, *ib.* 471. *Roebuck v. Dean*, 4 Bro. C. C. 403. 2 Ves. jun. 264. *Molesworth v.*

*Molesworth*, *ib.* 408. *Stapleton v. Palmer*, *ib.* 490. *Hutcheon v. Manning*, *ib.* 491, and 1 Ves. jun. 366. *Wadley v. North*, 3 Ves. 364. *Perry v. Woods*, *ib.* 204. *Booth v. Booth*, 4 Ves. 399. *Corbyn v. French*, *ib.* 419. *Brown v. Bigg*, 7 Ves. 279. *Bramston v. Wilkinson*, *ib.* 421. *Wilmot v. Wilmot*, 8 Ves. 10. *Bayley v. Bishop*, 9 Ves. 6. *Balmain v. Shore*, *ib.* 507. *Lane v. Goudge*, *ib.* 225. *Smither v. Willock*, *ib.* 233. *Lord Lincoln v. Pelham*, 10 Ves. 166. *Gaskell v. Harman*, 6 Ves. 156, and 11 Ves. 489. *Davidson v. Dallas*, 14 Ves. 576. *Halifax v. Wilson*, 16 Ves. 168. *Blamire v. Geldart*, *ib.* 314. *Leake v. Robinson*, 2 Meriv. 363. *Jones v. Mackilwain*, 1 Russell, 220.

REDSHAW v. THE GOVERNOR AND COMPANY OF THE BEDFORD LEVEL.

1759.  
19th & 20th  
June.

*Et è contra.*

(*Reg. Lib. B. 1758. fol. 415.*)

IN pursuance of an order of the *Bedford Level Company*, dated the 13th of *June*, 1672, for the better preserving the interests of the corporation and their rights of fishery, several leases of the feedings and fisheries were granted to members of the corporation; and among others one to *B. Jennings* for the term of twenty-one years at a yearly rent of £3.

Bill for a specific performance of a covenant for renewal dismissed, it being either a covenant for perpetual renewal, and if so, obtained without consideration from the lessor, or else inserted by mistake; but there being no proof of its having been improperly obtained, a cross bill, to have it declared void, was dismissed with costs.

By another order, dated the 10th of *February*, 1675, *Jennings* having represented to the corporation, that since the granting of the former leases, the lessees had derived but little benefit from them, in consequence of suits having been brought against them; it was ordered that new leases should be granted for an additional term of ten years from that time; and that upon paying a fine of one year's rent within ten years after such renewal, they should be renewable ever after.

This order had several times after it had passed been debated and attempted to be rescinded, but ineffectually; and the above lease had been renewed under it ever since, up to the year 1739; each lease containing a covenant from the company, that at any time before ten years were expired, they would, on request and payment or tender of the sum of £3, execute another lease for twenty-one years, with like reservation and covenants as in the present lease.

[ 347 ]

In the year 1749 the corporation refused to renew, and

1759.

REDSHAW

v.

The Governor  
and Company of  
the BEDFORD  
LEVEL.

the original bill was brought by the representatives of *Jennings* to have a renewal of a lease, dated the 13th of *June*, 1739, pursuant to the covenant. The cross bill prayed to be relieved against the covenant of renewal, and that the same might be declared invalid and of no force, as having been obtained by improper means, and for an injunction. It was proved that the annual value of the devised premises was above £120.

Mr. *Perrot* and Mr. *Coxe* for the plaintiffs in the original bill.

The *Attorney-General*, the *Solicitor-General*, and Mr. *Wilbraham*, for the company.

*The Lord KEEPER.*

The original bill in this case was brought to have a specific performance of a covenant for the renewal of a leasehold estate, value near £130 *per ann.*, at a fine of £3, by an addition of ten years. The lease was originally made by the corporation of the *Bedford Level* to Mr. *Jennings*, whose interest the plaintiff claims in a course of representation.

The introduction of the covenant was by a representation of Mr. *Jennings*, that a term of twenty-one years, granted to him in 1672, three years of which were then expired (1675), would not answer the expenses to which the lessees had been put, and were liable to, in defending suits for preserving the rights of the corporation. It does not appear to me that any such suits had been brought against the lessees. I do not well understand how such suits could have been brought, unless it were upon the right to the fisheries. The acting part of the corporation, however, recognize the truth of their member's representation, and immediately give an additional term of ten years, with a covenant to renew from time to time to make up the residue of the terms. In pursuance of this co-



tenant, this lease has, with many others, been renewed on the expiration of ten years, and filled up to twenty-one till the year 1749, when the corporation refused; and this bill was brought for a specific performance.


Let us consider the exact state of this case. First, The premises, consisting of feedings and fisheries, are of the annual value of £120 or £130: the rent is £3, the fine £3, being one year's rent. Secondly, Who are the parties? The grantors are a select part of the corporation: the grantees are members of that select body. What is the consideration or price of this renewable perpetuity? No onerous services on the part of the lessee: no money advanced: no improvement either stipulated or actually made.

Why then, this agreement, if it be construed in the sense contended for as an agreement for a perpetual renewal, was improvident, absurd, and unequal; so hard and injurious, that the covenantor grants away above £100 *per ann.* in lieu of £3 *per ann.*, and £3 once in ten years. How can this court decree a specific performance of it (a)?

(a) Lord *Thurlow*, in the cases of *Rees v. Dacre*, *cit.* 9 *Ves.* 332, and *Tritton v. Foote*, 2 *Bro. C. C.* 636, 2 *Cox*, 174, strongly expressed his disapprobation of \*covenants for perpetual renewal, as being of such a nature, as a court of equity ought not to execute. See also *Hyde v. Skynner*, 2 *P. W.* 196. *Russell v. Darmin*, 2 *Bro. C. C.* 639. *n.*

Lord *Eldon* has, however, (*Willan v. Willan*, *inf.*) ex-

pressly disavowed the doctrine of Lord *Thurlow*. The law upon this point appears now to be settled, as follows: The Court will lean against construing a covenant to be for a perpetual renewal; but, if it clearly appear to be so, it must be specifically executed; it will not, however, be inferred from a general provision, for a renewal with similar covenants; and the construction of such a covenant is the same

1759.  
  
**REDSHAW**  
*v.*  
**The Governor and Company of the BEDFORD LEVEL.**

[ \* 349 ]

1759.

REDSHAW

v.

The Governor  
and Company of  
the BEDFORD  
LEVEL.

[ \*350 ]

On the other hand, if the first order and the agreement are not to be taken in the sense of a perpetual renewal, \*but only for so many as were necessary to exhaust the two first terms of twenty-one years, then the whole series have proceeded on mistakes; for it does not appear that this agreement was ever confirmed after a disallowance of

in equity and at law, and ought not (as was permitted in *Cooke v. Booth*, *inf.*) to be affected by the previous acts of the parties. *Bridges v. Hitchcock*, 5 Bro. P. C. Ed. Toml. 6. *Betsworth v. The Dean and Chapter of St. Paul's*, Sel. Ca. in Ch. 66. 2 Eq. Ab. 26., and more fully reported 1 Harg. Jurid. Arg. 428. *Furnival v. Creme*, 3 Atk. 83. *Cooke v. Booth*, Comp. 819. *Bayley v. Corporation of Leominster*, 3 Bro. C. C. 529. *Ramstone v. Bentley*, 2 Bro. C. C. 415. *Baynham v. Guy's Hospital*, 3 Ves. 295. *Moore v. Foley*, 6 Ves. 232. *Iggulden v. May*, 9 Ves. 325. 7 East, 237. 2 N. R. 449. *City of London v. Mitford*, 14 Ves. 50. *Watson v. Hemsworth Hospital*, *ib.* 324. *Willan v. Willan*, 16 Ves. 72. *Dowling v. Mill*, 1 Mad. Rep. 548. See also Mr. Hargrave's very elaborate argument for the Earl of Inchiquin, 1 Harg.

*Jurid. Arg.* 411, and the cases which are there cited.

See the cases (which arose in *Ireland*, and occasioned the Irish Tenantry Act, 19 and 20 Geo. 3. c. 30.) as to the forfeiture of the right of renewal by the laches of the tenant, *O'Neil v. Jones*, 1 Ridgm. 170. *Kane v. Hamilton*, *ib.* 180. *Bateman v. Murray*, *ib.* 187. *Boyle v. Lysaght*, *ib.* 384. & *Vern. & Scriv.* 135. *Magrath v. Lord Muskerry*, *ib.* 166, & 1 Ridg. P. C. 463. and the construction put upon that act. *Jackson v. Saunders*, 1 Sch. & Lef. 447. Affirmed in D. P. 2 Dow. P. C. 437. *Lennon v. Napper*, 2 Sch. & Lef. 628. *Magrane v. Archbold*, 1 Dow. P. C. 109. *Earl of Mountnorris v. White*, 2 Dow. P. C. 459. *Keating v. Sparrow*, 1 Ba. & Be. 367. *Barrett v. Burke*, 5 Dow. P. C. 1. *Jessopp v. King*, 2 Ba. & Be. 81. *Barrett v. Pearson*, *ib.* 189.

the objections to it. I must therefore for these reasons dismiss the original bill without costs.

As for the cross bill, there seems to be no colour for supporting it, or bringing it. There appears no fraud upon the corporation in any one renewal of these leases in which the covenant has been severally repeated, and therefore as a corporate body they have no reason to complain. They had notice that the covenant was objected to, yet persisted in repeating it; and if any of the members were injured by it, they should have made a case against the select body of the corporation, and have sought a satisfaction against that select body for a breach of trust.

Though I see no equity to decree this agreement in specie, yet I see no reason to say that it was obtained fraudulently; and therefore I must leave the plaintiffs to make what use they can of it at law, and the cross bill must accordingly be dismissed with costs (a).

(a) "There are many cases in which the court will not disturb an agreement that has been executed, though it would have refused to carry that agreement into execution: and there are also many cases upon the other point, where refusing to execute an agreement, it will leave the party to make the most of it at law; and there is a third class of cases in which the court, refusing to carry the agreement into execution, would not stand neuter, but would order it to be delivered up." *Per Lord Eldon*, in *Willan v. Willan*, 16 *Ves.* 83. and *vid.* *Twining v. Morrice*, 2 *Bro. C. C.* 325. *Calverley v. Williams*, 1 *Ves. jun.* 213. *Marquis of Townshend v. Stangroom*, 6 *Ves.* 328. *Ex parte Lacey*, *ib.* 629. *White v. Damon*, 7 *Ves.* 32. *Mortlock v. Buller*, 10 *Ves.* 292. *Mason v. Armitage*, 13 *Ves.* 25.

1759.

REDSHAW

v.

The Governor  
and Company of  
the BEDFORD  
LEVEL.

1758.  
22d & 23d June.  
S. C.  
cit. *nom.* *Howorth v. Powell*,  
*Sugd. V. & P.*  
434. 626.

## HOWORTH v. DEEM.

(*Reg. Lib. A. 1757. fol. 571.*)

Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed: and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the court would not have interfered.

Covenant in a marriage settlement that the husband shall, within one year, execute, he being then under age, does not shew such an interest in him, as to put a purchaser upon inquiry.

Proof of constructive notice by one witness, not sufficient against a positive denial of notice by the answer.

By articles bearing date the 1st of *August*, 1674, previous to the marriage of *Thomas Howorth* and *Mary Masters*, and made between *Susannah Howorth* and *Thomas Howorth*, her son, of the one part, and *Herbert Masters* and *Mary*, his daughter, of the other, the said *Susannah Howorth* covenanted for herself and the said *Thomas Howorth*, that they would, within two years, settle certain premises in *Radnorshire*, and also the yearly sum of £50 *per ann.* on the said *Thomas Howorth* and his intended wife, for their maintenance. And reciting that they were seised in fee of the manor of *Whitehouse*, of the yearly value of £200; they covenanted that they would, within two years, at the request of the said *Herbert Masters*, convey the same to the use of the said *Susannah Howorth* for life; and if the said *Thomas Howorth*, or *Mary* his intended wife, survived the said *Susannah Howorth*, that so much should be charged on the said manor of *Whitehouse* as would make the said *Mary's* jointure £200 *per ann.*: and then that all the said lands should be settled to the heirs male between them; and for want of such issue, to the heir male of the said *Thomas Howorth* for ever.

The marriage was accordingly had: and the pedigree of the family is as follows:

does not shew such an interest in him, as to put a purchaser upon inquiry.

*Susannah Howorth*

1759.

*Thomas Howorth,* = *Mary Masters,*  
ob. 1711. ob. 1739.

HOWORTH  
v.  
DEEM.

*Herbert Howorth,* = *Margaret Lutley,* *Thomas,*  
ob. 1728. the plaintiff.

*Herbert,* ob. s. p. 1754. *Bartholomew,* Five daughters,  
ob. s. p. before the present de-  
his brother fendants.  
*Herbert.*

*Thomas Howorth* afterwards sold the *Radnorshire* estate.

By indentures, bearing date the 28th of *August*, 1695, made between *Herbert Masters*, *Susannah Howorth*, *Thomas Howorth*, and *Mary* his wife, and *Herbert Howorth*, and *Margaret* his wife, of the one part, and *Philip* and *Bartholomew Lutley* of the other part, reciting, that a marriage had been lately solemnized between the said *Herbert Howorth* and *Margaret* his wife, and that *Susannah* being entitled to the premises for life for her jointure, in consideration of a portion of £1500 paid to the said *Herbert Howorth*, the said *Susannah Howorth*, *Thomas* and *Mary Howorth*, *Herbert* and *Margaret Howorth*, and *Herbert Masters*, convey the *Whitehouse* estate to the said *Susannah Howorth* for life; remainder to the said *Thomas* and *Mary Howorth* successively for life; remainder to *Herbert Howorth* for life, with remainder to the first and other sons of that marriage; remainder to trustees to raise portions for younger children; remainder to *Herbert Howorth* in tail male, with remainder to the right heirs of *Thomas Howorth*. *Herbert Howorth* not being of age, there was a covenant in the settlement from *Thomas Howorth*, that *Herbert Howorth* should, within one year, execute this conveyance, with covenants for further assurance.

1759.  
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 HOWORTH
 v.
 DEEM.

At the foot of the above settlement it was expressed to be "sealed and delivered in pursuance of articles before marriage."

Herbert, the son of the last-mentioned marriage, in 1736, levied a fine, and suffered a recovery, and made several mortgages of the premises.

This was a bill brought by the grandson of the first *Thomas Howorth*, by *Thomas Howorth* his second son, to have an execution of the articles of 1674, and an account of the rents and profits from the death of *Herbert* in 1745.

It was contended for the plaintiff, that the articles of 1674 gave an estate for life to *Thomas*, with remainder to his first and other sons in tail, according to *Trevor v. Trevor*, 1 P. W. 622. *West v. Errissey*, 2 P. W. 349. and *Jones v. Lawton*, 1 Eq. Ab. 392, &c. It was also attempted to affect the mortgagees with constructive notice, on the ground that the covenant for *Herbert* the infant to convey, imported notice of his being seised of a particular estate, under the articles of 1674; and to affect *Mansel Powell*, who had been the agent of Mr. *Willington*, one of the mortgagees, and was himself also a mortgagee, with actual notice, in consequence of his having applied to *Mary*, the widow of *Thomas Howorth*, to join in the fine and recovery. They all denied notice. It was also contended, that the recovery was void for want of a tenant to the præcipe, *Mary* being then in possession, and having an estate for life, and that the fine was bad.

The *Solicitor-General*, and Mr. *Perrot*, for the plaintiff.

The *Attorney-General*, Mr. *Wilbraham*, Mr. *Hall*, and Mr. *Comyn*, for the different defendants.


The Lord KEEPER.

This bill is brought to have an agreement, made on

the marriage of *Thomas Howorth* in 1674, now eighty-four years since, carried into execution, and thereby to *have a settlement made in 1695, now sixty-three years ago, and which has prevailed ever since, defeated; together with several mortgages made twenty-two years since, in opposition to the plaintiff's title.

And it is upon this supposed case: that the owner of these lands agreed to settle them in 1674 upon the first and other sons of *Thomas Howorth* in tail male; that in 1745, the first and other sons of *Thomas* died without issue male; and that the equitable title of the plaintiff then commenced, and that he is now entitled to have these articles carried into execution against the heirs general of *Thomas*, and against those general heirs as incumbrancers, and the other mortgagees as purchasers with notice.

The case is endeavoured to be made out by articles which are produced, dated 1674, with the name and seal of *Thomas Howorth* placed and subscribed thereto; but on the face of it, it is only a covenant from *Susannah*, the mother of *Thomas*, tenant for her life, with the father of the intended wife of *Thomas*; and from which deed, applied to the transaction, it appears that *Thomas* was an infant, and neither did nor could covenant by that deed, therefore she covenants for herself and *Thomas*, &c. to settle, within two years, an estate in *Radnorshire*, and £50 *per ann.* out of *Whitehouse*, on *Thomas* and his intended wife for their maintenance; and in case the intended wife survived *Susannah*, as much as would make the *Radnorshire* estate £200 *per ann.*; and subject thereto, all the lands to the heirs male between them; and for want of such issue, to the heir male of *Thomas* for ever. This, the plaintiff's counsel contend, would have been a settlement to the first and other sons of

1759.

 HOWORTH
 v
 DERM.
 [*354]

1759.
 ~~~~~  
 HOWORTH  
 v.  
 DREM.  
 [ \*355 ]

*Thomas*, and that they are now entitled to a specific performance (a).

\*But before they can obtain a specific performance, it is necessary, as a fundamental, to shew a plain covenant by the owner of the estate. It is matter of discretion in the court, upon a covenant and the circumstances, to decree a specific performance; but it is an absurdity to ask it where there is no covenant at all.

I will suppose, contrary to the articles, for the sake of argument, that the covenant of *Susannah*, as owner of the estate, imported an agreement that the estate should be settled on the first and other sons of *Thomas*; yet I should not think myself at liberty to decree it at this distance of time, when all the family have abandoned it, and the plaintiff himself has never claimed it, till the filing of this bill; the father of the wife never pursued it; *Thomas* enjoyed the estate in opposition to it; sold the *Radnorshire* estate, and made a settlement in 1695 inconsistent with the articles. *Mary*, who was to have the *Radnorshire* estate, and a rent charge out of *Whitehouse*, to make her jointure £200 *per ann.*, never vindicates her right to it, but contents herself with *Whitehouse*, which she let for £100 *per ann.*, though she had then the articles in her custody.

Suppose the articles were valid, and were to be interpreted in the manner which the plaintiff's counsel contend for, yet *Herbert*, who suffered the recovery, was tenant in tail. He could suffer a recovery in equity; for in this court, the estate made to *Mary* in 1695 was void, and the recovery with double voucher would bar the estate tail.

(a) Upon this point, see *Cordwell v. Mackrill*, *post.* Vol. II. 344.



With regard to the incumbrancers, I am of opinion that there is no sufficient notice. The evidence of notice is, that there is a covenant in the settlement of 1695 that *Herbert* shall, within one year, execute the settlement. It is argued, that that shews an interest in the estate in him; that they should have inquired what that interest was, and it would have led them to a knowledge of the articles. This might have had some colour if *Herbert* had been of maturity; but it was a covenant necessary to make him a party to the settlement, therefore I think that circumstance does not prove notice (a).


With regard to the notice to *Mansel Powell*, I hold it equally insufficient. *Mansel* has denied notice, and so have the mortgagees. There is but one witness who proves constructive notice; but had it been actual notice, one witness is not sufficient (b).

Bill dismissed.

(a) Any thing which is sufficient to put a purchaser upon an inquiry, is good notice; as, where a title cannot be made out but by a deed, which, whether by description of the parties, recital, or otherwise, leads to another fact, he will be deemed conversant of that fact: so if he has notice of a deed, he will be bound by all its contents: so notice that part of an estate is in the possession of a tenant, is notice of a lease. *Surman v. Barlow*, post. Vol. II. 167. *Sheldon v. Cox*, ib. 224. *Coppin v. Fernyhough*, 2 Bro. C. C. 291. *Plumb v. Fluitt*, 2

*Anst.* 438. *Taylor v. Stibbert*, 2 *Ves.* jun. 437. *Hamilton v. Royse*, 2 *Sch. & Lef.* 326. *Crofton v. Ormsby*, ib. 599. *Hill v. Simpson*, 7 *Ves.* 170. *Hiern v. Mill*, 13 *Ves.* 120. *Hall v. Smith*, 14 *Ves.* 426. *Danicks v. Davison*, 16 *Ves.* 249, & 17 *Ves.* 433. *Eyre v. Dolphin*, 2 *Ba. & Be.* 301. *Dunbar v. Tredennick*, ib. 319. *Allen v. Anthony*, 1 *Meriv.* 282. *Toulmin v. Steere*, 3 *Meriv.* 210. *Taylor v. Baker*, 1 *Daniel*, 80. *Burnell v. Brown*, 1 *J. & W.* 168; and see *Sugd. Vend. & Purch.* 623, et seq.

(b) "If a defendant posi-

1759.  
  
 HOWORTH  
 v.  
 DEEM.

[ 356 ]

1759.

HOWORTH  
v.  
DEEM.

tively denies notice, and one witness is only produced to the fact of notice, a court of equity will place as much reliance on the conscience of the defendant, as on the testimony of a single witness, without some circumstances attaching a superior degree of credit to the latter." *Per Lord Eldon. Evans v. Bicknell*, 6 *Ves.* 185. *et vide Pember v. Mathers*, 1 *Bro. C. C.* 52. *Lord Cranstown v. Johnson*, 3 *Ves.* 170. *The East India Company v. Donald*, 9 *Ves.* 275. *Pelling v. Armitage*, 12 *Ves.* 80.

[ 357 ]

1759.

25th and 27th  
June.

S. C.

*Cor's P.W.* 82. n.  
*Hill*, MSS.  
*Sewell*, MSS.

Where testator had directed that his executors should not be liable for each other's acts, one of them, who was in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it, and sign a receipt: held, that as no part of the money had come to their hands, they should not be answerable.

*MATTHEW SMITH*, by his will, dated 27th *May*, 1755, bequeathed to the plaintiffs two legacies of £300 and £100 each, and left the residue of his personal estate to his widow; and appointed the defendants, *Clarke*, *Betta*, and *Thompson*, his executors, with a special proviso that one of his executors should not be liable for the acts of the other, but only each for his own acts. The testator died the 22d *June*, 1755.

Part of his estate, to the amount of £600, was at the time of his death out on mortgage. On the 29th of *April*, 1756, *Thompson*, who was an attorney, called in the mortgage and received the money, and the same day sent round his clerk to his co-executors, with a particular request that they would execute the assignment, and sign the receipt, which they accordingly did. On the 27th of *June*, 1756, *Thompson* became a bankrupt without having accounted for the £600 which he had received; and the plaintiffs, the legatees, filed this bill to charge the co-executors with the money so received by *Thompson*.

It was in proof in the cause that *Thompson* was much

## WESTLEY v. CLARKE.

(Reg. Lib. Min. Trin. 1759.)

in the confidence of the testator, for whom he acted as attorney; that he was in good credit at the time the £600 was paid to him, and continued so till within five weeks of his bankruptcy.

The *Solicitor-General* and Mr. *Perrot* for the plaintiffs.

The defendants, the executors, have joined in the assignment of the mortgage, and a receipt for the mortgage money, when it was not necessary, and have thereby made it their own act. The difference between them and trustees is firmly established; the latter are necessary parties to every act, and therefore when they join, are only liable to account for so much as they have actually received. *Townley v. Chalenor*, *Cro. Car.* 312. *Bridg.* 35., where it is also said, that it is the fault of the creator of the trust, if he create an insufficient trustee. In *Fellows v. Mitchell*, 1 *P. W.* 81. 2 *Vern.* 504. 515, two trustees, each had received a moiety, held that each should only be liable for what he had himself received. Again, in *Murrell v. Cox*, 2 *Vern.* 570, executors joined in receiving money: the court held they were both answerable for the whole, and remarked that the case of executors differed from that of trustees. *Fellows v. Mitchell* was reheard, upon a suggestion that the last-mentioned case was contrary to it; but Lord *Cowper* adhered to his former opinion, and maintained the distinction between executors and trustees. In *Churchill v. Hobson*, 1 *P. W.* 241, indeed, where two executors joined, and only one received, Lord *Harcourt* made a distinction between the case of a creditor and a legatee, but it was afterwards overruled. As to the clause that they should be charged for the acts of each other, no argument can be founded on that. The execution and signing of the receipt was their own act, and we only seek to charge them in respect of it.

1759.

WESTLEY  
v.  
CLARKE.

[ 358 ]

1759.

WESTLEY  
v.  
CLARKE.

[ 359 ]

The *Attorney-General* and Mr. *Wilbraham* for the defendants.

The distinctions between the cases of executors and trustees are not very solid: substantial justice must be the same in both. In the case of *Churchill v. Hobson*, the court took hold of a very slight circumstance to get rid of the rule: here the circumstances are much stronger. The money was paid to *Thompson* in discharge of the mortgage. On payment of the money, the lien on the estate was transferred, and the debt discharged. The subsequent joining of the other executors was not necessary to the effectuating the transfer of that lien, and merely transferred the legal estate: they never for a moment had any control over the money.

*The Lord KEEPER.*

27th June.

This bill is brought by a legatee to charge two executors with assets not actually received by them, but for which they had given a receipt; and by that, as the plaintiffs insist, made themselves liable for the actual receipt of the money by the third: and the claim is founded on this—That it is a general rule in this court, that if executors join in a receipt, they make themselves all liable *in solido*, because it is an unnecessary act; as each executor has an absolute power over the personal assets and rights of the testator. And that the contrary rule holds with respect to trustees; that they are not answerable for joint receipts each *in solido*, but only in proportion to what they actually receive.

But though there are distinctions in the books concerning the acts of trustees and those of executors, according to the cases cited for that purpose, yet those distinctions seem not to be taken with precision, sufficient to establish a general rule; for a joint receipt will charge trustees in

*solido* each, if there is no other proof of the receipt of the money. As, if a mortgage is devised in trust to three trustees, and the mortgagor, with his witness, meets them to pay it off; the money is laid on the table, and the mortgagor having obtained a reconveyance and receipt for his money, withdraws, each trustee is answerable *in solido*. On the contrary, in the case of *Churchill v. Hobson*, executors gave a joint receipt, only one was held liable. And this authority, which is not an exception of any particular case, but an exception grounded on circumstances, shews there is no such rule.

So that the rule seems to amount to no more than that a joint receipt given by executors is a stronger proof that they actually joined in the receipt, because generally they have no occasion to join for conformity.

But if it appears plainly that one executor only received, and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to control the act of their co-executor, either before or after that act was done, what grounds has any court in conscience to charge him? Equity arises out of a modification of acts, where a very minute circumstance may make a case equitable or iniquitous. And though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the right of curtesy or dower; yet there can be no rule for the future determination of this court, concerning the acts of men.

But this case is stronger. The testator might direct the condition of his executors so as not to be questioned by his volunteers. The proviso, therefore, that one executor shall not be answerable for the acts of another, though not very frequent in wills, is a good proviso between executors and legatees who take under the same will: here was an actual receipt by *Thompson*, and a re-

1759.

WESTLEY  
v.  
CLARKE.

[ 360 ]

1759.  
 ~~~~~  
 WESTLEY
 v.
 CLARKE.

ceipt given by him. The only act that affected the assets was the first that discharged the debt; and, according to the sense of the bar, transferred the legal estate. Then *that* they are not to answer for, and the second is nugatory (a).

I am therefore of opinion that *Clarke* and *Betts* are not liable to make good this £600 received by *Thompson* (b).

(a) See Lord *Redesdale's* observations with reference to this circumstance, and his general comments on the case, 2 *Sch. and Lef.* 243.

(b) The old rule as to the distinction between the receipt of trustees and executors was much shaken by the opinion expressed by Lord *Harcourt*, in *Churchill v. Hobson*, and the decision of the present case, which was expressly approved of by Lord *Alvanley*, in *Hovey v. Blake-man*, 4 *Ves.* 596. To these may be added the observations of the *Lord Keeper* in *Harden v. Parsons*, *ante*, 147, 148. Lord *Eldon* has, however, repeatedly expressed his disapprobation of the relaxation of that rule in favour of executors; and subsequent

cases, with the above exception, have firmly re-established it. *Sadler v. Hobbs*, 2 *Bro. C. C.* 114. *Scurfield v. Hovey*, 3 *Bro. C. C.* 94. *Bacon v. Bacon*, 5 *Ves.* 331. *Chambers v. Minchin*, 7 *Ves.* 197. *Brice v. Stokes*, 11 *Ves.* 323. *Langford v. Gascoigne*, *ib.* 333. *Joy v. Campbell*, 1 *Sch. and Lef.* 341. *Doyle v. Blake*, 2 *Sch. and Lef.* 231. *Crosse v. Smith*, 7 *East*, 246. Lord *Shipbrook v. Lord Hinchinbrook*, 16 *Ves.* 477. The authority, however, of the present determination (though somewhat doubted by Lord *Thurlow*, 2 *Bro. C. C.* 116.) has, in consequence of the particularity of its circumstances, never been expressly denied.

AUSTEN v. TAYLOR.

(Reg. Lib. A. 1758. fol. 486.)

1759.
30th June.
2d July.
S. C.

Amb. 376.
Hill's MSS.
Perryn, MSS.

THE Reverend *John Holman*, by his will, bearing date the 19th of *December*, 1756, after devising certain lands in *Northin*, gave and devised all other his freehold and gavelkind lands whatsoever, to trustees and their heirs, upon the trusts following: in the first place, to the intent and purpose that his four sisters should severally and respectively receive and take an annuity or rent charge of £80 *per annum*, and subject thereto, in trust for the plaintiff, *John Austen*, and his assigns, for his life, *without impeachment of waste; remainder to the said trustees to preserve contingent remainders; remainder to the use of the heirs of the body of the said *John Austen*; remainder to testator's own right heirs.

He then, after giving certain pecuniary legacies, gave the residue of his personal estate to the said trustees, in trust, to lay out the same, in one or more purchase or purchases of freehold messuages, &c. of an estate of inheritance in fee-simple; which said premises should then after remain, continue, and be, to, for, and upon such and the like estate or estates, uses, trusts, intents and purposes, and under, and subject to the like charges, restrictions, and limitations, as were by him before devised, limited, and declared, of and concerning his lands and premises last-before devised, or as near thereto as might be, and the deaths of persons would admit.

The bill prayed an account of the personal estate, that the surplus might be invested, and the will esta-

Devise of land to trustees in trust to pay an annuity and subject thereto in trust to *A.* for life; remainder to trustees to preserve, &c.; remainder to the heirs of the body of *A.*; remainder to testator's right heirs, and the residue of testator's personal estate to be laid out in land, and settled to the same uses; held, that *A.* was entitled to an estate tail in the lands to be purchased.

[* 362]

1759.
 ~~~~~  
 AUSTEN  
 v.  
 TAYLOR.

blished, and the plaintiff be let into possession. The only question was, whether the plaintiff was entitled to an estate for life, or in tail, in the lands to be purchased.

The *Attorney-General* and Mr. *Bonner* for the plaintiff.

The question for the determination of the court is, what estate the plaintiff is entitled to in the *residuum* of the testator's personal estate; because the limitation of the real estate is too clear to admit of discussion. This court cannot make a different construction in trust from what the rule of law requires in legal limitations. This is not like the case of articles; there is nothing left to the trustees to perform, except to buy the land: there is no direction to settle, as in *Papillon v. Voice*, 2 P. W. 471, where the limitations were expressly repeated. When the land is bought, the limitations have been declared by the testator: it is to be the same as in the other lands.

The *Solicitor-General*, Mr. *Wilbraham* and Mr. *Ingram* for the heir at law; Mr. *Sewell* for the executors.

[ 363 ]

We admit the real estate to be limited in such a manner as to give the plaintiff an estate tail; the sole question therefore is, with regard to the money which is to be laid out. This is an executory trust, and the weight of the authorities upon that point prove, that as such, it ought to be settled as an estate for life, with remainder to the first and other sons in tail male. Lord *King* in *Papillon v. Voice*, said, that in the case of an estate executory, the intent should take place, and not the strict rule of law. *Ashton v. Ashton* (a), 14th November, 1734, at the *Rolls*. A devise of lands to be settled to A. for life, and after his death to the issue of his body; and for want of

(a) *Fearne's C. R.* 120. Cit. 1 *Ves.* 149. 2 *Atk.* 582.



such issue, remainder over : a strict settlement decreed. *Allgood v. Withers* (a), 4 July, 1735. A conveyance to trustees to apply the rents to A. for life, and after her death to the heirs of her body, and their heirs: Lord *Talbot* was of opinion that she only took an estate for life. In *Leonard v. Earl of Sussex*, 2 Vern. 526, which was a devise to trustees to settle a *Residuum*, &c. it was held by the court, that the intent to benefit the issue should be as strong in the case of an executory devise, as in marriage articles. But it is said that the present case differs materially from *Papillon v. Voice*. That there is no reference to the trustees to settle ; but it is impossible to carry the testator's intention into execution without a settlement of some sort. It is said also that there was a difference in the repetition of the limitations ; but how does that alter the case ? Words of relation must necessarily be of as great force and power as the words they are made to refer to : they stand in their place, and are only inserted to prevent repetition, therefore the maxim that *Verba relata inesse videntur* must give force to them. There are two rules of construction of wills ; the one necessary and legal, the other (as in all cases of executory trusts) in compliance to the evident intent of the testator. Now here it was very plainly his intent (and the court may say so) to give an estate for life in both instances : that the words in the prior clause get the better of the intent from the necessary operation of the rule of law ; but that in the other, the intent shall take place as far as it can.

1759.  
AUSTEN  
v.  
TAYLOR.

[ 364 ]

*The Lord KEEPER.*

The only question in this cause, and upon this will, is, 2d July.

(a) Cit. *Fearne's C. R.* 120. *Burr.* 1107. 1 *Ves.* 150.  
2 *ib.* 648. 2 *Atk.* 582.

1759.  
 ~~~~~  
 AUSTEN
 v.
 TAYLOR.

what estate *John Austen* is entitled to, according to the intent of the testator, to be collected from the face of his will, in the lands to be purchased with the *residuum* of his personal estate. It is agreed on both sides that he takes, by virtue of the limitations in the will, a legal estate tail in those lands which the testator calls his other freehold and gavelkind lands, though the limitations “thereof be to him expressly for life, without impeachment of waste; remainder to trustees to support contingent remainders; and from and after his decease, in trust for the heirs of the body of *John Austen*, and for default of such issue, ‘to the use and behoof of his own right heirs.’” And this is admitted on the authority of *Duncomb v. Duncomb* (a), and *Colson v. Colson* (b).

[365]

It was said that these determinations were contrary to the intent of the testator from the necessity of the law, which had imposed a rule, that where an estate for life was created, and a limitation to the heirs of the body, those words must be taken as words of limitation, though the testator’s intent was contrary. I said I knew no such rule with respect to wills; for that it was a maxim in law and equity, founded in obvious and everlasting good sense, that every man may, (being supposed *inops consilii* at the time of making his will,) by any words whatsoever, settle and devise his estate according to his intent, if that intent be agreeable to law. And therefore there must be a better ground than mere authority for making an express tenant for life, tenant in tail, with a capacity to defeat the limitation to the heirs of his body. For in the case of *Duncomb v. Duncomb*, where the limitation was for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of tenant for life, though there were no contingent remainders to

(a) 3 Lev. 347.

(b) 2 Att. 246.

be supported, unless the latter words were taken as words of purchase, yet it does not appear to have been so much as questioned, whether the word *heirs* was a word of limitation or of purchase. But the sole dispute was, whether the estate to the trustees prevented the merger of the estate for life in the estate tail.

The reason, therefore, why these words have been taken in these cases as words of limitation, and not of purchase, seems to me to have been, that the law having fixed that meaning to the words, courts of justice could not say that the testator did not mean them to be accepted in that sense, but as words of purchase, unless there were other expressions made use of in the will, plainly evidencing that intent.

Therefore in *Bale v. Coleman* (a), an express estate for life, with a power of leasing, was not sufficient to explain those words differently from their original meaning. So in the case of *Legate v. Sewell* (b), an express estate for life, with words of limitation superadded to words of limitation, was not sufficient for the reasons given in the arguments in *Shelley's* case (c). So in *King v. Melling* (d), where the word *issue* was taken as a word of limitation, the express estate for life, and the power to jointure, were not sufficient indications of the testator's intent, that the heirs should take as purchasers.

Yet these were all cases of wills, where, if the testator's intent had appeared to have been to have used the words in that sense, both courts of law and courts of equity ought to have given them operation and effect accordingly. For there can be no doubt but that, if a devise was made "to, or in trust for, *I. S.* for life, and after

1759.
AUSTEN
v.
TAYLOR.

[366]

(a) 1 *P. W.* 142.

(c) 1 *Co.* 94.

(b) 1 *Vern.* 552. 1 *P. W.* 87.

(d) 1 *Vent.* 225. 2 *Lev.* 58.

1759.
 ~~~~~  
 AUSTEN  
 v.  
 TAYLOR.


his death to the heirs of his body, such heirs to take as purchasers," courts of law and equity must interpret the word *heirs* in a sense contrary to their obvious meaning, and not as words of limitation to the heirs of the body of tenant for life.

But in the present case, the effect of the legal limitation not being questioned at the bar, I have only made these observations to shew that these determinations are not arbitrary, but are founded, as appears to me, on sound and solid reasons.

But the contest here is, what estate *John Austen* is to have in the lands purchased by the residuum. It is said that this is an executory trust, and that it is a general rule in the case of an executory trust, that where an estate for life is given, together with a limitation to the heirs of the body, this court will take the words to be words of purchase, and direct a conveyance of the estate accordingly. The words *executory trust* seem to me to have no fixed signification. Lord *King*, in the case of *Papillon v. Voice*, describes an executory trust to be, where the party must come to this court to have the benefit of the will. But that is the case of every trust; and I am very clear that this court cannot make a different construction on the limitation of a trust than courts of law could make on a limitation in a will, for in both cases the intention shall take place. And it would be most dangerous to say, that this court, and a court of law, could be warranted in raising different interests from the same words. Yet I am of opinion, that the determinations on those cases, which are called cases of executory trusts (and particularly the case of *Papillon v. Voice*), are sound determinations.

That case was as follows. *A.* devised £10,000 to trustees, to be laid out in lands, and *to be settled* on *B.*

for life, without impeachment of waste, and from and after the determination of that estate, to trustees and their heirs, during the life of *B.* to preserve contingent remainders; remainder to the heirs of the body of *B.* with remainders over; with a power to *B.* to make a jointure. Now this executory trust, as it is called, is no declaration of the limitations of the estate, but is a sort of instruction, or heads of a settlement, which the trustees are directed to make; and as every trust is to be carried into execution according to the intent of the parties, it was impossible to decree an estate tail consistent with such intent. The trustees were to settle the estate for life, with trustees to support contingent remainders; with a remainder (that is, a contingent remainder) to the heirs of his body, with remainders over. Now an estate tail would have been no settlement; and therefore, in articles for a settlement, it is of course. So in the case of *Leonard v. Earl of Sussex*, where the trustees were to settle the estate, so as the sons could not dock it. So in *Brampton v. Kynaston*, at the *Rolls*, 1728.

1759.  
  
 AUSTEN  
 v.  
 TAYLOR.

The result, therefore, seems to be, that the rule, with respect to trusts declared, and legal limitations, is the same. But in cases of imperfect trusts, left to be modelled by the trustees, and where, according to Lord *Talbot's* observation in *Lord Glenorchy v. Bosville (a)*, something is left by the creator of the trust to be done, the trusts ought to be executed in a more careful manner, or, in other words, the creator meant they should, and for that purpose has referred it to his trustees.

[ 368 ]

But to apply and inquire how far the case of *Papillon v. Voice* is in point. In that case the testator directed a settlement of the lands to be purchased. Those lands,

(a) *For.* 3.

1759.

~  
AUSTEN  
v.  
TAYLOR.

and the lands devised, were independent of, and had no relation to, one another. And there was no more reason to argue the intent from one to the other, than if there had been two distinct devises of legal estates in the same will: one to *A.* for life, remainder to his first and other sons; the other to *A.* for life, remainder to the heirs of his body. Secondly, Here is no reference to the trustees to settle, which is the strongest indication of the testator's intent. Thirdly, There is nothing left to the trustees to be done.

But then it was said, that if the limitations had been repeated, that it would have been the same with *Papillon v. Voice*. But I think not: because the testator refers no settlement to his trustees to complete; but declares his own uses and trusts, which being declared, I know no instance where the court has proceeded so far as to alter or change them.


Where the assistance of the trustees is necessary to complete a limitation, it is sufficient evidence of the testator's intent, that the court should model the limitations, but where they are already declared, the court has no authority to alter them.

[ \* 369 ]

The true criterion is this: wherever the assistance of the trustees, which is ultimately the assistance of this court, is necessary to complete a limitation, in that case the limitation in the will not being complete, that is sufficient evidence of the testator's intention, that the court should model the limitations. But where the trusts and limitations are already expressly declared, the court has no authority to interfere, and make them different from what they would be at law.

It must therefore be referred to the Master to take usual accounts; and that the clear residue of the said testator's personal estate be invested in the purchase of lands of inheritance in fee simple, to be approved of by the said Master, and that the defendants, the executors, do take conveyances thereof to them and their heirs, to the uses, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as are by the said

testator's will limited and declared of and concerning all and singular the said testator's freehold and gavelkind lands (a).

1759.  
  
 AUSTEN  
 v.  
 TAYLOR.

(a) Mr. *Ambler* observes, that this opinion was very dissatisfactory to the bar in general. The accuracy of his information may, however, be doubted, as the authority of the determination has never been questioned. Mr. *Fearne*, while he admits that the distinction between executory trusts, and trusts not executory, was carried to its utmost limits, cites and relies upon it as one of the numerous cases which established the doctrine (that had been broken in upon by *Bagshaw v. Spencer*), as to the analogy between the limitations of legal estates and trusts. The inaccuracy, indeed, of Mr. *Ambler*, in stating his lordship to have said, "that the testator did not intend the trustees should

make a conveyance," has called forth an intimation of dissent from Lord *Eldon*, *Green v. Stephens*, 17 *Ves.* 76. In the above report, which is entirely from the Lord *Keeper's* hand writing, it will be seen that there is no such observation. He seems to have distinguished the present case from *Papillon v. Voice*, by the circumstance of the testator having (according to an expression frequently used in modern cases, *Foley v. Burnell*, 1 *Bro. C. C.* 285. Countess of *Lincoln v. the Duke of Newcastle*, 12 *Ves.* 225. *Brouncker v. Bagot*, 1 *Meriv.* 271.) taken upon him to be his own conveyancer. See *Wright v. Pearson*, *ante*, p. 119.

[ 370 ]

1759.  
2d July.  
S. C.  
Cit. 4 Ves. 529.  
Sewell, MSS.

## EARL of SALISBURY v. NEWTON.

(Reg. Lib. Min. Trin. 1759.)

Wife held to be entitled to a provision against the particular assignee of the husband for valuable consideration, of the whole of her equitable interest.

THE defendant, Mrs. *Durham*, was entitled to the sum of £2000, as her portion under her father's marriage settlement, or to a legacy of £600 under his will, which was given her in lieu and satisfaction of the portion. Mr. *Durham*, her husband, being indebted by bond to the plaintiff, the Earl of *Salisbury*, assigned to Sir *Matthew Lamb*, in trust for him, all and every thing he was entitled to in right of his wife, for payment and satisfaction of the said bond, and died without making any provision for his wife and children. This was a bill brought against her trustee for an assignment.

The *Solicitor-General* and Mr. *Perrot*, for the plaintiff, cited *Turner's case*, 1 Vern. 7. *Pitt v. Hunt*, ib. 18. *Miles v. Williams*, 1 P. W. 248. *Bosville v. Brander*, ib. 458. Lord *Carteret v. Paschal*, 3 P. W. 197.

The *Attorney-General*, Mr. *Sewell*, and Mr. *de Grey* for the defendant, the widow.

This assignment cannot stand in this court against the wife and the issue of the marriage. No settlement was made by the husband, and therefore she was entitled to have a provision made for her and her issue in preference to the plaintiff's claim. *Burnett v. Kinnaston*, 2 Vern. 401. *Jacobson v. Williams*, 1 P. W. 382. *Jewson v. Moulson* (a).

[ 371 ]

(a) 2 Atk. 417.



*The Lord KEEPER.*

If the husband himself had come into this court, the court would have compelled him to make a settlement, and his assignee cannot be in a better situation than he himself would have been in (a). The assignees of a bankrupt have an assignment of his estate by an act of parliament, which is stronger than the present case, and yet if they come here for a legacy or portion due to the wife, the court will take care that a provision is made for her. Many of the cases cited are not cases of a wife unprovided for.

It must therefore be referred to the Master for the widow to make her election, whether to take under the will of her father, or by the articles; and that the Master may inquire if there is any settlement, and if not, that he may consider of a proper settlement and provision for herself and children, and that the overplus, if any, be paid to the plaintiff in satisfaction of his bond, &c.


(a) See this species of reasoning controverted, 9 *Ves.* 100, and 1 *Russell*, 41.

This was the first case which distinctly established, the equity of the wife to a provision out of her own fortune, against the *particular assignees* of her husband for valuable consideration; for in *Jewson v. Moulson*, Lord *Hardwicke* grounded his judgment upon the particular circumstances of the case. The only point which he considered

clear, was her equity against *the husband's volunteers*. The doctrine in the above case has been recognized and adopted, particularly by Lord *Alvanley*, who disapproved the doubt thrown upon it by Lord *Thurlow* in *Worral v. Marlar* and *Bushan v. Pell*, cit. in Mr. *Cox's* note to *Bosville v. Brander*, 1 *P. W.* 459, and since reported 1 *Cox*, 153. *Like v. Beresford*, 3 *Ves.* 511. *Mauley v. Phillips*, 4 *Ves.* 15. *Franco v. Franco*, *ib.* 515.

1759.

Earl of  
SALISBURY  
v.  
NEWTON.

1759.  
  
 Earl of  
 SALISBURY  
 v.  
 NEWTON.  
 [ \* 372 ]

*Hill v. Atkinson*, cit. *ib.* Vide 421. *Lamb v. Milnes*, 5  
 also *Pryor v. Hill*, 4 Bro. C. C. Ves. 507. *Carr v. Taylor*,  
 138. *Pope v. Crawshaw*, *ib.* 10 Ves. 514. *Beresford v.*  
 326. \**Mitford v. Mitford*, 9 *Hobson*, 1 *Mad. Rep.* 362.  
*Ves.* 100. *Wright v. Morley*, As to the wife's equity being  
 11 *Ves.* 20. As to the wife's personal to herself, vide *Scri-*  
 equity against the general as- ven v. *Tapley*, post. vol. II.  
*signees* of the husband, vide 337; and as to what amounts  
*Burdon v. Dean*, 2 *Ves. jun.* to a reduction of the wife's  
 607. *Oswell v. Probert*, *ib.* choses in action into posses-  
 680. *Brown v. Clark*, 3 *Ves.* sion, vide *Forbes v. Phipps*,  
 166. *Freeman v. Parsley*, *ib.* post. 502.

1759.  
 16th July.

JALABERT v. Duke of CHANDOS.

(Reg. Lib. A. 1758. fol. 523.)

Where a lease had been granted with a covenant for renewal, and also the deputation of a keepership, with a memorandum to renew concurrently with the lease; and upon the renewal, a few days before the expiration of the term, the renewed deputation had been by mistake made

for the residue of the old, instead of for the new term: held, that the mistake ought to be rectified; and though there was a covenant in the lease not to assign, yet as that covenant would not at law have prevented an underletting, the same relief was given to an under tenant as the original lessee would have been entitled to.

JAMES, Duke of CHANDOS, was seised or possessed of the following offices, viz; master of the game and deer, in *Enfield Chase*; master forester, and keeper of the said chases; keeper of the *East Baillie*, *West Baillie*, and *South Baillie* walks in the said chases; ranger of the said chases; and keeper of all and singular the messuages and houses within or belonging to the said chases; which had been granted by letters patent bearing date the 21st June, 3 Jac. 2. to Viscount *Lisburn*, his executors, administrators, and assigns, for the term of fifty years. By other letters patent, bearing date the 6th of April, 6 William and Mary, the said offices were

granted to Sir *Robert Howard*, his executors, administrators, and assigns, for the further term of fifty-six years, to commence at the end and determination of the former term.

By indenture, bearing date the 29th of *February*, 1731, the duke demised to the honourable *Robert Moore*, his executors, administrators, and assigns, the west, or great lodge in *Enfield Chase*, with the appurtenances, for the term of seven years, at a rent of £170, with a covenant that, in case the rent was behind hand, or the said *Robert Moore* should set over the said term or premises, or any part thereof, without licence of the said *Henry*, Duke of *Chandos*, his executors, administrators, or assigns, it should be lawful for him, the said *Henry*, Duke of *Chandos*, his executors, administrators, or assigns, to re-enter upon the said premises: there was also a covenant that, in case the said *Robert Moore* should give notice to the said duke, his executors, administrators, or assigns, six months before the expiration of the said term, the said duke, his executors, administrators, or assigns, would renew for such term or terms of years (except the last three months of the said duke's term or terms of years,) as the said duke should have to come therein under the same rents, covenants, and agreements, *mutatis mutandis*, as were therein contained, except the covenant for renewal.

By a grant of the same date, the Duke of *Chandos* granted to the said *Robert Moore*, his executors, administrators, and assigns, the office of keeper of the *West Baillie* walks for the said term of seven years: and by a memorandum at the foot of it, it was agreed that, in case the said *Robert Moore* should take a new lease of the said lodge and premises for the longer term in the present demise mentioned, then the said Duke of *Chandos* should and would give a new deputation to the said *Robert*

1759.  
JALABERT  
v.  
Duke of  
CHANDOS.

[ 373 ]

1759.

~  
JALABERT  
v.  
Duke of  
CHANDOS.

*Moore*, for the term in such new lease to be mentioned.

In *August*, 1737, Mr. *Moore* gave a notice for a renewal, and received in answer the following letter.

“ Sir,

*August* 15, 1737.

“ I received your letter you were pleased to write me, and have, according to the notice you gave me, directed Mr. *Hamilton* to prepare a new lease and deputation for me to execute to you, pursuant to the covenant in the present lease. As soon as they are ready, I will immediately sign them ; and wish you all the satisfaction imaginable in the enjoyment of them.

Yours, &c.

*Chandos.*”

[ 374 ]

By an indenture, bearing date the 13th of *September*, 1738, and which was sixteen or seventeen days before the expiration of the first term of years granted to the duke, the duke demised the said premises for the residue of the term he had in the premises (except the last three months), from *Michaelmas* ensuing, under the like rents, reservations, covenants, and agreements, as in the former lease. And by a grant of the same date, reciting that the said *Robert Moore* then stood possessed, by virtue of a demise made from the duke to him, of the said premises for a term of years then to come and unexpired, and particularly expressed in the said demise of the said duke, he, the said duke, granted to the said *Robert Moore*, his executors, administrators, and assigns, the office of keeper of the *West Baillie* walks, from thenceforth during the continuance of the said term, for which the said demise was made from the said duke to the said *Robert Moore* as aforesaid.

The plaintiff *Jalabert* was the assignee of *Moore* (for a shorter time than he held under the duke), and having been disturbed by the present duke in the exercise of his

office of keeper, brought an action against him, and upon a special verdict, it was determined by the court of *Common Pleas*, that this was not a new grant from the duke, but a confirmation of the old one, it having been executed sixteen or seventeen days before the effluxion of the old one, and taking no notice of the new one, nor of the second lease, and that term of years having expired before the assignment to plaintiff, that therefore he could derive no title.

1759.  
JALABERT  
v.  
Duke of  
CHANDOS.

This was a bill brought against the present duke of *Chandos* (as executor of his father, the late duke), the Marquis of *Caernarvon*, his son, to whom he had assigned the offices, and *Moore*; and also against the agents of the marquis, who had disturbed him in the exercise of his rights, to rectify this mistake; and it prayed that a new and sufficient grant of the said office might be executed, and for an injunction.

[ 375 ]

The *Attorney-General* and Mr. *Sewell* for the plaintiff.

Mr. *Perrot*, Mr. *de Grey*, and Mr. *Wilbraham*, for the defendants.

Since the late determination of the court of *Common Pleas* (a), it must be admitted, that Mr. *Moore* had at law a right to assign. But it is founded upon such an extreme strictness of construction, that it ought to meet with no favour here. He has no equity, having intruded himself by force of a quibble of law, which construes the agreement of not alienating without licence into an agreement not to alienate the whole term. He has come in contrary

(a) This refers to another point which arose in the *Common Pleas*, viz. whether the under lease, for part of the original term, was not an assignment. The case is no where reported, but is alluded to in *Crusoe v. Bugby*, 3 Wils. 236, under the name of *Jolli- bert v. Duke of Chandos*: vide note, *post*.

1759.  
 JALABERT  
 v.  
 Duke of  
 CHANDOS.

to the words of the original agreement, and in direct opposition to the intention of the duke. It is besides a voluntary grant, and ought not to be aided in equity.

*The Lord KEEPER.*

This is a bill brought by Mr. *Jalabert*, claiming under a lease of a lodge, and a grant of a keepership in *Enfield Chase*, under Mr. *Moore*, who was lessee and grantee of the late Duke of *Chandos*: and it is to have a mistake in the term of duration of that grant rectified, and to have a grant according to the intent of the parties to the agreement.

[ 376 ]

The first lease and grant were respectively for the term of seven years, with a covenant in the lease for a further term, and a memorandum on the deputation, that a further deputation should be granted by the duke to Mr. *Moore*, co-extensive with the further lease. Both the further lease and further deputation were made: but being made by anticipation, the deputation was referred to the term in the first lease, and was, in fact, not a deputation for a single day further. It was a mistake, of which neither of the parties were aware, and which was not discovered till all the instruments were found on special verdict. The consequence was, that the plaintiff's claim was expired by effluxion of time, contrary to the intent both of the Duke of *Chandos* and Mr. *Moore*. This is admitted on both sides to have been a mistake. And I think it would be an injustice to Mr. *Moore*, and an undeserved injury to the memory of the late duke, to leave it unrectified.

But it is said, that it was the intent of the Duke of *Chandos* that Mr. *Moore* should reside constantly, and not let the estate; and that, as he has evaded that agreement, he cannot in conscience claim this deputation to go contrary to the original intent. But I cannot see any

reason to justify me in saying, that the agreement of the parties was different from the construction put upon it at law; and any decree that I shall make will not vary that construction; for I shall only do what the duke intended to have done, that is, make them co-extensive. It is impossible for me to put a different construction on a legal covenant than a court of law has done; and it would be a dangerous precedent for the subject. For a man who departs from plain agreements may, perhaps, determine according to his own spirit, and not the spirit of the agreement (a).

The next objection is, that it is voluntary, and ought not to be aided in equity. But without entering into the value of the premises demised, or the appointment of the keepership, it appears to me that his grant was clothed with a good consideration, was a sufficient inducement to the purchase, and was valuable both in advantage, honour, and delight. The duke thought the lease a valuable contract, for he expressly stipulates with *Moore*, that if he takes a further term, he shall take it for the whole term, except three months, and *Moore* stipulates for a further deputation co-extensive with the further lease. If, then, *Moore* had an equity, the plaintiff stands in his place, and it is contrary to natural justice to say, that the duke, the defendant, could control it by any notice or act of his.

(a) The principal cases assigns in law, *Goring v. Crusoe v. Warner*, 2 Eq. Ab. 100. *Phil-Bugby*, 3 Wils. 234. *Bl. Rep. pot v. Hoare*, 2 Atk. 219. 766. *Palmer v. Edwards*, cit. *Doe v. Carter*, 8 T. R. 57. *Doug.* 187. n. *Roe v. Harrison*, 2 T. R. 425. *Doe v. Doe v. Bevan*, 3 M. & S. 353. *Worsley*, 1 Campb. 20.; and *Doe v. Smith*, 1 Marsh, 359. 5 Taunt. 795, et vide *Lloyd v. Crispe*, ib. 249.

that the term *assigns*, in such a proviso, does not extend to

1759.  
JALABERT  
v.  
Duke of  
CHANDOS.

[ 377 ]

1759.

JALABERT

v.

Duke of  
CHANDOS.

What was the intent of the proviso not to alienate? Merely to avoid disagreeable neighbours. The duke could not mean that nobody should come there without his assent, because the lease would go to executors and administrators.

I must therefore decree, that the bill against *Moore* and the other defendants be dismissed with costs; that the Duke of *Chandos*, or the Marquis of *Caernarvon*, or either of them, in whom the letters patent are vested, execute a new deputation to the plaintiff, his executors, and administrators, in the same words, and to the same effect with the deputation of the 13th of *September*, 1738, determinable with the lease of the 13th of *September*, 1738. And that the injunction be made perpetual (a).

[ 378 ]

(a) As to the doctrine of courts of equity in rectifying mistakes in deeds, contracts, bonds, &c. *vide Uvedale v. Halfpenny*, 2 P. W. 151. and the cases cited in the note to it. *Thomas v. Frazer*, 3 Ves. 399. and the cases cited in the note. *Burn v. Burn*, *ib.* 573. *Stangroom v. the Marquis of Townshend*, 6 Ves. 328. *Gray v. Chiswell*, 9 Ves. 118. *Young v. Walter*, *ib.* 364. *Underhill v. Horwood*, 10 Ves. 227. *Stapylton v. Scott*, 13 Ves. 427. *Ramsbottom v. Gooden*, 1 Ves. & Be. 165.



NASH v. ASH (a).

(Reg. Lib. Min. Trin. 1759.)

1759.  
23d July.

S. C.  
Core, MSS.

THE bill in this case was brought for an account relating to the profits of a game called *E. O.*, and that the defendants might be decreed to pay to the plaintiff what, upon a just account, should appear to be due to him.

The bill stated that the defendants, *Joye* and *Ash*, were the proprietors of two public rooms at *Tunbridge Wells*, and that, for the carrying on such game of *E. O.*, they had prepared tables at each of their rooms, and that they had proposed to the plaintiff that he should become a partner and sharer with them in the profits of this game, upon his contributing a rateable proportion to the stock or fund with which the game was to be carried on: and that the plaintiff had agreed to become a sharer therein to the amount of one fourth part of the fund, and was thereupon admitted to a fourth part of the profits. *Wheatley*, who was originally a defendant, but who died after the institution, was the fourth partner.

That the defendants had carried on this game for many years to great profit, alternately at *Bath* and *Tunbridge*, during the respective seasons at those places, for which the defendants refused to account.

To this bill the defendant *Joye* put in a general demurrer, and assigned for cause, that the game and tables

Issue directed to try whether an agreement to carry on an illegal game, and a contribution for that purpose, had been made or not.

[ 379 ]

(a) The various entries of MSS. the title is *Nash v. Joye*: in the Register's book *Joye*: in the Minute book, it are under the name of *Nash v. Joye*. is as above. *Wheatley*. In Mr. Core's

1759.

NASH

v.

ASH.

in the bill mentioned were unlawful, and prohibited by the several statutes, some or one of them, and that a discovery of the matters as prayed by the bill might tend to subject him to several penalties and forfeitures inflicted by the several statutes in that case made and provided. The demurrer came on to be argued before Lord *Hardwicke*, March, 1755, who overruled it as being too general.

The defendants, by their answer, denied their having entered into such agreement with the plaintiff, and if they had, yet they insisted that the game was an unlawful game, contrary to many acts of parliament, and that therefore, though such agreement had been made, it was what a court of equity ought not to relieve in, and that it was below the dignity of the court to take notice of any such contracts.

Upon the evidence it appeared doubtful whether any such agreement as charged by the bill had really been made between the parties or not.

Mr. *Sewell* and Mr. *Jones* for the plaintiff.

Mr. *Core*, for the defendants, contended, that the bill was founded on a supposed agreement, no way made out or proved, or at best in a very uncertain manner, and *non constat* that the plaintiff was bound to any thing, and that therefore it was at most but a *nudum pactum*, to which neither party was bound. That the plaintiff had attempted to be relieved by an action at law, and was nonsuited there; and now a remedy is sought for in this court, and though it may be said to be the proper business of a court of equity to compel men to a specific performance of fair and just agreements, yet that this is a matter in the discretion of the court, and that whoever comes into a court of equity for relief, must draw his equity from pure fountains.

That the agreement here insisted upon is plainly founded in fraud, and the worst of frauds, being a con-

spiracy to cheat the public; it being therefore a corrupt agreement, shall this court give it aid? That there is more reason for the court to decree against it, than for it, or, at least, to stand neuter; and that it must be unworthy the jurisdiction of the court to aid an agreement founded on such a mixture of fraud and imposition, he cited *Savage v. Taylor*, For. 234. *Philips v. Duke of Bucks*, 1 Vern. 229. *Gumley v. Jeffries*, 2 Vern. 415.

1759.

NASH  
v.  
ASH.

Who then are the parties to this supposed agreement? Persons wandering from place to place, from *Tunbridge* to *Bath*, from *Bath* to *Tunbridge*, with instruments of deceitful gaming, to deceive and draw in unwary people, and it is admitted by the parties themselves, that it is such a nuisance to the public, that the justices of the peace of every county they come into, ought to suppress it; that the parties are within all the vagrant laws; that the building and keeping public rooms for gaming, is not only against law, but *contra bonos mores*, and that neither this court, nor the courts of law, will establish contracts in opposition to statutes, and especially where the contract appears, as in the present case, to be *malum in se*. That it is a practice little better than that of the jugglers, who used to go about the country with their cups and balls: and supposing an agreement had been made between them to go profit and loss, can it be supposed that this court would aid such an agreement? That it is like the case of one *Wrethock*, in the court of *Exchequer*, where a bill was brought for an account between highwaymen (a).

[ 381 ]

(a) There is some account of this flagitious transaction in the *European Magazine* for 1787, Vol. II. 360, in *Evans's* appendix to *Pothier*, Vol. II. 3, and in the appendix to *Clifford's Report* of the *Southmark Election*.

1759.

NASH

v.

ASH.

*The Lord KEEPER.*

Though he held clearly that the game was unlawful, and had himself frequently suppressed it at *Bath*, yet observed, that if there was such an agreement and contribution as charged by the bill, there was no reason why some of the parties, and perhaps the worst, should run away with the whole stock and profits: and that the court ought to make them just to one another. He said that he could not allow it to be a matter beneath, or unfit for the judgment of the court, and therefore directed an issue to try whether any such agreement and contribution, as charged in the bill, was ever made or not, and reserved all further considerations until after the issue tried (a).

(a) Though the court will give no countenance to gaming transactions, yet it has seldom denied to extend its relief against the gamester himself in behalf of the person injured; as where two men play on a joint stock, and one holds the stakes, and sweeps up the money, he shall answer a moiety of that to his companion. Treatise on Equity, book 1. c. 4. s. 6. So in *Watts v. Brooks*, 3 *Ves.* 612, Lord *Loughborough* held, that he would not exclude the result of an illegal contract in decreeing an account: and that in like manner, smuggling transactions,

and illegal dealings in stock, though the court would not execute the contract, should be brought into an account. And in a case of *Mince v. Peters*, *Harg.* MSS. No. 112 p. 86, cited at length in *Eden* on Injunctions, p. 20, Lord *Harcourt* appears to have administered a similar species of relief. See also *Bosanquet v. Dashwood*, *Fer.* 38, and notes to it. *Neville v. Wilkinson*, 1 *Bro. C. C.* 543, and Mr. *Fonblanque's* note, Vol. II. p. 6. These cases, however, may be considered as overruled by Sir *W. Grant's* decision in *Knowles v. Haughton*, 11 *Ves.* 168.

SIMS v. BENNETT.

(Reg. Lib. B. 1760, fol. 80.)

1759.  
22d & 23d Feb.  
10th November.  
S. C.  
Gw. 874.  
Core, MSS.  
Hill, MSS.

THE bill in this cause was filed by the plaintiff, as vicar of the parish of *Eastham*, in the county of *Essex*, against the defendants *Bennett* and *Johnson*, as occupiers of land within the parish, and against the defendants *Wilkes* and his wife, and *Hitch*, as claiming the rectory impropriate of the parish.

The bill stated, that in *January*, 1756, the plaintiff was instituted and inducted to the vicarage of the said parish.

That in the year 1309, the abbot and convent of *Stratford Langhorn*, in the county of *Essex*, having complained to *Ralph de Baldock*, then Lord Bishop of *London*, of great losses by inundations of their lands, and other distresses, the bishop, by an instrument of appropriation, dated the 9th of *April* in that year, after observing that the revenues of the said monastery were greatly reduced by the accidents and other means mentioned in the said instrument, did, for the relief of their distresses, by the advice and with the consent of his chapter, and by virtue of his pontifical authority, give, grant, and appropriate to the said abbot and convent the parish church of *Eastham* to the use of the monastery for ever, saving thereout a convenient portion for the support of a perpetual vicar in the same church. And therefore he ordained that the vicar should have a mansion-house, and should have and take the tithes of gardens and curtilages, and all sorts of tithes *præter decimas garbarum et fœni, et molendini ad ventum*, and that he

Whether a tithe be great or small, is determined by the nature of it, and not by the mode or place of its cultivation, or the use to which it is applied: and therefore the tithes of beans and peas, though gathered green by the hand for the food of man, are a great tithe, and included under the term *decimæ garbarum*.

1759.

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SIMS

v.

BENNETT.

should have all oblations, offerings, legacies, mortuaries, and altarages, and that he should also receive from the abbot and convent five merks sterling yearly, *de prædict' decimis garbarum*, in augmentation of his aforesaid portion, reserving the collation to the vicarage to the bishop and his successors.

The bill then stated that, in the reign of *H. 8.*, the estates and possessions of the abbot and convent, upon the dissolution of the monastery, were by act of parliament vested in the crown, and that the king afterwards, by letters patent, made a grant of the rectory, under which grant the rectory is now claimed as impropriate by the defendants *Wilkes* and his wife.

That the defendants *Bennett* and *Johnson* have occupied and enjoyed several parcels of land within the parish, and that in the year 1756, and in other subsequent years, they have planted and sowed such land with several quantities of beans and peas, and from time to time gathered the same by hand in the field, by plucking them from the stalk whilst green, and sent the same to several markets, and there sold the same for the food of man, without paying the plaintiff tithes thereof, or making him any satisfaction for the same. The bill charged, that such tithes have always been considered as small tithes, and belonging to the vicar of the said parish, and not only so, but that, as vicar as aforesaid, the plaintiff is entitled to the tithes of beans and peas, gathered green, by virtue of the said endowment, and that by virtue of such endowment, all manner of tithes yearly growing, arising, or renewing in the said parish, except the tithes of corn and grain, belong to, and were thereby duly and properly granted to the vicar for the time being; and the bill therefore prayed an account and satisfaction for these tithes.

1759.

Sims
v.

BENNETT.

The defendants *Bennett* and *Johnson*, by their answer, admitted that they had sowed several acres in the parish with beans and peas, and that they had gathered and sold the same green, but said that the tithes of all beans and peas, whether gathered green or otherwise, having been always paid to the rector, and esteemed to belong to him, they had therefore, from time to time, compounded with the defendants *Wilkes* and his wife, as she is the impropriatrix of the rectory, and hoped they should not be again compelled to account with the plaintiff as vicar for these tithes, and submitted the right to the judgment of the court.

The defendants *Wilkes* and his wife, by their answer, claimed the rectory impropriate during the life of Mrs. *Wilkes*, and the defendant *Hitch* claimed the same in reversion, after her death. And they insisted that beans and peas cultivated in the fields by the plough, wherever the same, when ripe, are gathered into barns, or gathered by the hand from the stalk when green, are to be considered as great tithes, and belonging to the impropriator, and ought not to be looked upon as small tithes, or as belonging to the vicar, and said they believed that neither the plaintiff, nor any vicar of the parish, ever received any tithe of beans or peas, but that such tithes have always been taken by the impropriator.

Upon the evidence it appeared, from many witnesses, and some very old ones, that for at least forty or fifty years last past, beans and peas had been cultivated in the fields or grounds of the parish, and that the same had been gathered and sold green; and many witnesses proved that the tithes thereof had always been paid or compounded for to the impropriator; and no instance at all was shewn, wherein such tithes were ever paid or compounded for to the vicar.

1759.

Sims

v.

BENNETT.

The *Solicitor-General*, Mr. *Wilbraham*, Mr. *Jones*, and Mr. *Clarke*, for the plaintiff.

There is no doubt but that peas and beans sown in a garden, and gathered green, are a small tithe; and if they are so in a garden, they must also be so in a field. The manner of husbandry cannot alter the nature of tithes. In *Wharton v. Lisle*, 3 *Lev.* 365, which was a case concerning the tithes of flax arising in the parish of *Thorpe* in *Essex*, in which it appeared that the rector had always received the great tithes, and the vicar the small; it was held, that flax, being in its nature a small tithe, it made no difference whether it was sown in the garden or in open fields; and though there appeared to be twenty-six acres of arable ground sown with flax, it was held, that the vicar was entitled to the tithes of it. The three judges who differed from *Holt*, C. J., held, that quantity could not alter the nature of the tithes, and on the authority of *Bedingfield v. Feak*, *Cro. Eliz.* 467. *Moor*, 909. *Owen*, 74. 1 *Roll. Ab.* 310. 335, condemned the doctrine in *Uvedale v. Tindale*. In *Austen v. Nicholas*, *Bunb.* 19, which was affirmed in the *House of Lords*, it was decided that where the vicar was entitled by prescription to the tithes of peas and beans, set and planted in rows, and managed by a spade or hoe in a garden-like manner, culture by the plough could not alter his rights. *Gumley v. Burt*, *Bunb.* 169, is no authority, for there was neither endowment, nor proof of enjoyment. In *Smith v. Wyatt*, 1742, Lord *Hardwicke* held, that a vicar, endowed of small tithes, was entitled to the tithe of potatoes as a small tithe, though set in the open fields and in great quantities. All garden-stuff is small tithes. In *Stephens v. Martin*, which was determined 7 *Wm.* 3. in the *Exchequer*, it was held, that the tithe of carrots and turnips, though sown and heed, be-

1759. 6

SIMS
v.

BENNETT.

longed to the vicar. One objection which may be made to this demand is, that the same stock may happen to bear both great and small tithes. But there are several cases which overrule that. Clover, cut green, is a great tithe; when suffered to stand to seed it is a small tithe. *Wallis v. Pain*, *Com. Rep.* 633. Tares cut green are a great tithe; when suffered to grow to seed a small tithe. *Hodgson v. Smith*, *Trin.* 1715, in the *Exchequer*. The difference made between what is gathered and what is threshed, arises from the use that is made of them. That which is gathered is for the use of man, and therefore not considered as a great tithe. In 1 *Rol. Ab.* 647, it is said, that no tithe shall be paid for green peas gathered to spend in the house.

But, supposing it to be a great tithe, still the vicar was intended to be endowed with it. The appropriation is *decimæ garbarum* to the monastery, *omnimodæ aliæ decimæ* to the vicar. It is not included in this exception. Beans and peas plucked from the stem by the hand while green, however cultivated, or wherever planted, can never be tithed under the description of *decimæ garbarum*. *Spelman*, in his glossary, interprets *garba* to be *fasciculus* either of fruits or wood: *Du Fresne* calls it *spicarum manipulus*: *Matthew of Westminster* says, *frumenti manipulus quem patriâ linguâ dicimus "sheaf," gallice vero, "garbam."* How can peas and beans fall under the description contained in the word *garba*? They are set out and taken by a measure totally different. The prescription in *Pigot v. Hearne*, *Moore*, 483, was *decimam garbam*, which was a thing in prescription and property; if *decimæ garbarum*, it would have been otherwise. In *Barsdale v. Smith*, *Cro. Elis.* 633, and 2 *Ro. Abr.* 335, pl. 7, it was held, that the word *garba*, strengthened by a usage, was sufficient to take in tithe hay, a pretty sufficient indication that, without such usage, it would

CASES IN CHANCERY.

1759.

Sims

v.

ENNETT.

not. In the present case the evidence of usage amounts to nothing, for this culture has commenced in the parish within the last fifty years.

The *Attorney-General*, Mr. *Sewell*, and Mr. *Perrott*, for the defendants.

This is a case of very great consequence to all vicars and impropriators. It is a new experiment. It arises upon the gathering, and the use and application of beans and peas, and not on the mode of culture. The precise demand in the bill is for an account and satisfaction for the tithes of all beans and peas gathered by the hand whilst green, and sold at market. So that, if they are gathered and got in, in the usual manner, the bill admits them to be a great tithe. Indeed, beans and peas must from their nature have always been a great tithe. When dry they have always been considered as a rectorial tithe, and there can be no sufficient reason to say, that their being gathered green can make a difference. If so, one part of a field, producing the very same crop, would be great tithe, and the other small; and the farmer would have it in his power to determine to whom he should pay his tithes, the rector or the vicar. If the rector be entitled to the tithe of beans and peas, he must be so whether they are considered as dry or green.


The Lord KEEPER.

Suppose Indian corn should be sown in this country, would it be a great or a small tithe?

For the defendants.

Being of the general nature of corn, which is a great tithe, it must be taken as great tithe also. In *Hodgson v. Smith*, in the *Exchequer*, July 14, 1715, *Bunb.* 279, it was held, that vetches cut green were a great tithe, as participating of the nature of hay. There is no solidity

in the distinction as to one being the food of man, and the other of beasts. The reasoning would make oats small tithes, which in many parts of *England* are applied to the food of man as well as of horses. *Holt's* opinion in *Wharton v. Lisle* has never been espoused.

1759.

 SIMS
 v.
 BENNETT.

As to the word *garba*, it signifies not only what is, but what may be bound up. It may comprehend beans and peas, as well as every other sort of corn or grain growing in fields. *Barsdale v. Smith* shews the great extent to which the word *garba* may be taken, and weight being laid upon the usage, it makes it so much the stronger for the present purpose, for there was the strongest evidence of usage possible, which is a very material circumstance. *Nicholas v. Elliott* was founded on usage, as appears from *Gumley v. Burt*.

Mr. *Coxe* on the same side (a).

Although the substantial question must depend upon the old instrument of endowment, yet there are in the present case many incidents material to determine the right of the parties.

The foundation of the defendant's claim is grounded on common right; that of the plaintiff's is against it; for *primâ facie*, and of common right, all tithes belong to the rector, and the vicar can claim none but what he can shew a right to, either by endowment, or from usage of payment, which is evidence of an endowment.

That here, an endowment being produced, the question is specific, whether the tithe of peas and beans is included in it or not; but as the general endowment of vicarages is of the small tithes only, and as all other tithes are called rectorial tithes, it may be material to consider at large, whether the tithe of peas and beans is to be taken

(a) This argument is from and is the same as the one in Mr. *Coxe's* own hand-writing, *Gwillim*.

1759.

Sims

v.

BENNETT.

as a great or a small tithe, for, if taken as a great tithe, it may substantially be said to belong to the rector; but, if considered as a small tithe, it would still rest as a matter to be shewn within the endowment, and it would be impossible to say with propriety, that the gathering green or dry could make a difference; for, suppose the exception had been of peas and beans generally, the gathering them one way or the other could not have varied the right.

That it is difficult precisely to distinguish what great or small tithes are. In the Codex, Vol. II. 691, great tithes are said to be corn, grain, and wood; and that small tithes are the prædial tithes of other kinds; and also the mixed and personal tithes. Now corn may be said to be grain of all sorts, and therefore that beans and peas are to be considered in their nature as great tithes; and then it seems to be allowed, from the cases cited on the other side, of *Wharton v. Lisle* and *Smith v. Wyatt*, that the quantity of the lands sown with them, or the manner of husbandry, cannot alter their nature.

It seems probable that the first line of distinction between great and small tithes was made according to the quantity and value of things; and as the original culture of the lands in *England* was corn, hay, and wood, they were determined to be the great tithes; and other things, being of less value and quantity, were left as small tithes, and though the reason of the distinction may fail in particular cases, yet, as it has reduced things to a certainty, it is fit to be adhered to as a sound permanent rule; and where new things have been introduced, the tithes of them have always been considered as great or small, according as the thing most participates of what was before determined to be great or small tithes; and though it is difficult to search out the true ground and foundation on which things depend, yet, suppose corn sown in great

quantities in a garden, it would be almost absurd to say, that this could change the nature of the tithe; and it would be the same thing to suppose pot herbs sown in great quantities in an open field, should thereby change their nature with respect to the tithes.

If, then, beans and peas, come to their maturity, are to be considered as corn and grain, and, consequently, that the tithes thereof are great tithes, the gathering them green can no more alter the nature than the particular manner of the culture can, where they are sown in open fields.

The case that seems to have occasioned all the difficulty upon this matter is the case of *Sir Richard Uvedale v. Tindale*, reported in *Hutton*, 77, where it is said, that quantity was held to be sufficient to make that great which otherwise would be a small tithe. But it appears in the report of this case in *Cro. Car.* 28, that what was said by *Hutton* to have been the opinion of the court, was only the argument of *Serj. Hendon*, of counsel for the plaintiff; and in *Cro. Car.* it appears that *Hendon*, having argued that *minutæ decimæ* are properly intended of such things which are but of small consideration in a parish, as herbs in a garden, and such like, and that therefore woad sowed in a field is not *minutæ decimæ*, *Serj. Bridgman*, of counsel for the defendant, cited a case of the Dean and Chapter of *Norwich*, 43 *Eliz.* where it was adjudged upon a special verdict, That the tithes of forty acres of land, planted with saffron, appertained to the vicar, and not to the parson; to which *Hendon* answered, that, that was not because they were *minutæ decimæ*, but for that, upon the endowment found, the allegation was, that the parson should have tithe of corn and hay only. But, *per Yelverton*, who was a judge of the court, That was not the reason, but because they were accounted as *minutæ decimæ*, and appertained to

1759.

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SIMS

v.

BENNETT.

1759.
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 SIMS  
 v.  
 BENNETT.

the vicar, and it is very remarkable upon this, that if such observation was made by one of the judges of the court, it is impossible that the points mentioned in *Hutton* to have been agreed to by the court, could ever in fact have been so agreed to; besides, the case, as reported in *Cra. Car.*, concludes with these words: "And all the justices resolved, woad, growing in *nature* of an herb, the tithe thereof ought to be reputed for *minutæ decimæ*," and judgment was given for the defendant.

The case, therefore, in *Hutton*, thus considered, plainly shews that tithe must receive its denomination of great or small, from the nature of the thing in question, and not from the time of gathering, or from the quantity, or the place where it is sown. And it is plain from comparing of books together, that all the writers who have endeavoured to maintain the contrary doctrine, or to raise doubts upon the matter, have transcribed their arguments from that mistaken case in *Hutton's* reports, which is a posthumous work, and a translation only from the author's manuscript.

As to the case of *Wharton* and *Lisle*, it is reported in several other books besides 3 *Levinz*; it is also in 4 *Mod.* 183, *Carth.* 263, *Skin.* 341, and 356, *Comb.* 201. 209; and as this case is reported in some of the books, it appears that judgment was given by three judges against the opinion of *Holt*, C. J., that flax, being a small tithe in its nature, ought not to be considered as a great tithe, from its being sown in large quantities. But upon considering all the books together, it appears very far from being clear, that this judgment was, in fact, against the opinion of *Holt*; for it appears that the judgment was given in his absence, and therefore the objections mentioned to have been thrown out by him could only have been for breaking the case, and throwing out his doubts to the counsel, who were afterwards to argue it, and in

*Skinner* there appears an adjournment by *curia advisari vult*, and he might afterwards satisfy his doubts, and alter his opinion, which judges now (I speak it with deference) often do after a first or second argument. And if he did not concur with the other three judges in the judgment that was given, it can hardly be supposed that, in a case of so great consequence in point of precedent, they would have given judgment in his absence. And it is plain that all his objections, in their utmost force, amount to no more than what is said in that mistaken case in *Hutton* before mentioned. And in the case of *Pain v. Underhill*, in the *Exchequer*, it was said by *Comyns*, Chief Baron, in giving the judgment of the court, that Chief Justice *Holt* had changed his opinion, and was not against the judgment; upon the whole, therefore, it must be submitted, that beans and peas, as grain, are in their nature great tithes; and the manner of gathering them, or the culture, or the quantity, cannot alter the specific nature of them.

But be this as it will, as here a special endowment is produced, it must be admitted that the substantial question in this case will depend upon the construction of the endowment itself, and the usage that hath been upon it. Now the principal words of the endowment are, *Quod vicarius habeat decimas hortorum ac omnimodas decimas, præter decimas garbarum*. From the words *decimas hortorum* it hath been argued, that this, *ex vi termini*, includes the tithes of beans and peas, beans and peas being a garden tithe. But this is too flimsy an argument to deserve any laboured answer. Garden tithes are a distinct specific species of tithes, and every thing whatsoever, renewing in the short compass of a garden, would yield a small tithe, and even wheat itself. But this case would be no rule to judge of the nature of tithes in other cases.

1759.

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Sims  
v.

BENNETT.

1759.  
 ~~~~~  
 SIMS .
 v.
 BENNETT.
 [*393]

The true question, therefore, must depend on the construction of the word *garba*, and the usage.

*Bishop *Stillingfleet*, in that part of his *Ecclesiastical Cases*, p. 207. where he treats of the duties and rights of the parochial clergy, says, "In some appropriations there were vicarages endowed, and here the difficulty lies in distinguishing the tithes which belong to one from the other." The best rules I can find to be satisfied in this matter, are the endowments or prescriptions." "The greatest difficulty hath been about small tithes, which is the common endowment of vicarages."

Now as the word "*garba*" in this endowment must, in a great measure, rule the determination in the present case, it will be very material to trace out its true meaning and definition from books of authority, and the sentiments of learned men, in order to see, not whether these tithes merely, but whether in general this species of tithes is or is not concluded in the word *garba*; for if it can be shewn to be so, it seems decisive of the present question, for then it will bring these tithes directly within the exception of what the vicar is not endowed of.

It must be admitted that the word "*garba*" is of very complex, doubtful construction; and there seems to be no English word sufficient to take in the whole meaning of it. In *Du Fresne's* Glossary, it is defined by the word "*manipulus*." In *Cowel* it is said to mean a bundle, and that in some places it is taken for a handful. In *Spelman's* Glossary it is defined by the word "*fasciculus sive e frugibus sive e lignis*." In *Lambard's* Collection of the Saxon Laws, 139, among the laws of *Edward the Confessor*, the title of the eighth law is "*De decimis ecclesie reddendis*;" and then the first words of the law are, "*De omni annonâ decima garba Deo debita est*." But the most material construction of the word arises

from Archbishop *Stratford's* Constitutions with *Lindwood's* Comment. These Constitutions were made in the year 1342 in the time of *Ed. 3.*, not long after the *date of the endowment in question; and the fourth canon, as appears in *Lindwood*, 188, was this: "Men, blinded by the deception of a damnable sin, cannot escape the perdition of their souls while they pay the tenth garb of their fruits for labour, and by mistake in counting, pay the eleventh garb instead of the tenth. We therefore to obviate such damnable attempts of perverse men by wholesome remedy, by the advice of this counsel, do pronounce them to be involved in the sentence of the greater excommunication." The original words are, "*Erroris damnabilis devio excæcati suarum animarum excidia non devitant, dum frugum suarum decimam garbam solventes pro labore metentibus, eâ minimè computatâ, non absque errore calculi, pro decimâ undecimam solvunt garbam, &c.*" Then comes the "*Nos igitur.*" Here the word "*garba*" is applied to *fruges*, which must mean all the fruits of the earth, and it shews how the ecclesiastics understood the word about the time when the endowment in question was made; but the gloss brings it more directly to the present question. Under the word *frugum* it is said, *Harum appellatione larga continetur redditus, et non solum talis qui de frumentis et leguminibus* (which is beans and peas), *verum etiam qui ex vino, silvis cæduis, &c. capitur*; by which it appears that *legumen* as well as *frumentum* was comprised in the ancient signification of the word "*garba.*" And this corresponds with the reason of the grant, which was to supply the poverty of the religious house. But the gloss is still stronger under the word "*metentibus,*" where it is said, "*Ex hoc verbo apparet, auctorem hic loqui de frugibus, in quantum ad messionem apta sunt, ut puta de frumento, hordeo, fabis, pisis* (peas and

1759.

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SIMS

v.

BENNETT.

[* 393]

1759.

Sims

v.

BENNETT.

[395]

beans,) *avenis, milio, et cæteris hujusmodi, quæ meti solent.*" If this is of any authority, nothing can be stronger to shew, that in the ancient ecclesiastical signification of words, beans and peas are comprehended in the word "*garba.*" The text of the canon is certainly binding in *re ecclesiasticâ*; and *Lindwood*, the author of the gloss, was undoubtedly a man of great judgment and accuracy, and very industrious to find out the true foundation of things. The book is taken notice of with great commendation by Bishop *Nicholson*, in his account of the church historians, in his English Historical Library, where he says the commentary or gloss was of the learned collector's own composure, who was doctor of laws, official of *Canterbury*, and at last Bishop of *St. David's*. And though the old canons made in convocation are not binding on the laity, yet that they are binding in *re ecclesiasticâ* was determined, upon great consideration, in the case of *Middleton v. Croft*, 2 Str. 1056, where it was holden that the old canons concerning clandestine marriages were binding even on the laity, and a consultation as to this was awarded; besides, the common law cases amount to the same thing. In *Southcote v. Southcote*, *Alleyne* 80, in an action of debt upon the statute of 2 & 3 Ed. 6. the plaintiff set forth that he was *proprietary decimarum garbarum et fæni, &c.* and that the defendant sowed certain land, containing so many acres, in that parish, with grain, and after mowed it, and carried away the grain, not setting out the tenth part. After verdict for the plaintiff upon *nil debit* pleaded, it was moved, in arrest of judgment, that the plaintiff hath entitled himself as *proprietary decimarum garbarum*, and demands tithes of grain in general; whereas *garbarum* is a word of uncertain signification, and divers sorts of grain are not wont to be bundled up, as rape-seed, mustard-seed, and cummin-seed, which used

to be thrashed out in the field ; but the objection was overruled, and the plaintiff had judgment : which case plainly shews that *garba* may mean any sort of grain, and that it is not confined to corn only, or to such grain only as may be garbed or bundled up. And the case which has been mentioned of *Barsdale v. Smith*, shews that the word may be extended to the tithe of hay, where the usage has taken it to be so, which may introduce the question upon the usage in the present case.

1759.

 SIMS
 v
 BENNETT.

[396]


Now it is proved beyond all doubt, that the tithe of beans and peas, gathered green, have been paid to the impropriator for above forty or fifty years ; and no one instance whatsoever is produced of its ever having been paid to the vicar. It is surely then false reasoning upon this, to say that such evidence amounts to nothing, for that it appears by it, that this kind of culture has commenced in this parish but for about half a century, and no longer. I say, this is false reasoning ; because it appears, from undoubted authority, that in *re ecclesiasticâ* a usage of forty years is evidence of a prescription, and that it is not like the common law prescription, which must be time out of mind. By the statute of 2 & 3 E. 6. c. 13, which gives the treble penalty for not setting out tithes, it is provided that every of the king's subjects shall set forth their tithes in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid ; and that no person shall henceforth take or carry away any such or like tithes, which have been yielded or paid within the said forty years, or of right ought to have been paid. My Lord Coke, in his comment on this statute, 2 Inst. 649., upon the words "within forty years," makes this observation : "This time of forty years is here set down, because it is the usual time for the proof *de modo deciman-*

1759.
 SIMS
 v.
 BENNETT.

[397]

di." And at page 653, he says further, that " for the better understanding of this statute, and our books, it is good to be known what the time of prescription for tithes is by the canon law : and the time for prescription in that case is forty years, by which time of prescription a spiritual person may gain by the canon law a right of tithes in another parish." And a little lower in the page he says, "that the custom once established doth continue." But there is a modern case remarkable to this purpose in 1 *Str.* 87. *Drake v. Taylor*. The vicar libelled in the ecclesiastical court for tithes of turnips, and laid his title to them by prescription and endowment. The defendant pleaded, that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips ; and he moved for a prohibition *pro defectu triationis*, and obtained a rule *nisi* ; but the rule was discharged, the question being between two ecclesiastics, one or other of whom must be entitled, and it is indifferent to the tenant who has them ; and Mr. Justice *Pratt* added this further reason, " because in the spiritual court fifty years makes a prescription." And in *Sanderson v. Claget*, 1 *P. Wms.* 657, Dr. *Claget* libelled in the ecclesiastical court against *Sanderson*, for the annual sum of 6s. 8d. as a procurator fee due by custom for visitations ; upon which *Sanderson* moved the *King's Bench* for a prohibition, and obtained a rule *nisi*. But it being an ecclesiastical duty, and claimed both by and from ecclesiastical persons, the court discharged the rule ; and Lord C. J. *Pratt*, in giving the opinion of the court, said, " That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom, and by their law forty years make a custom or prescription." But further in *Wallis v. Paine*, *Com. Rep.* 642, where the vicar being endowed of small tithes, the question was, whether clover-seed was a great or small tithe : and

there, though the court determined it to be a small tithe, yet it appears that great weight was laid upon the depositions in the cause, by which it appeared that the vicar for forty or fifty years had received the tithe. The words of the book are, "But in this cause it seems most evident it should be so taken; since, by the depositions in the cause, it appears that for forty or fifty years in this parish the vicars have received the tithe of this seed." Which cases plainly shew what great weight the evidence in this cause ought to have in determining the nature of the tithe in question.

1759.

 SIMS
 v.
 BENNETT.

[398]

Besides this, a further argument for giving a liberal extensive construction to the word "*garba*" arises from the clause of reservation of five marks yearly, to be paid *de decimis garbarum*. There is no such specific coin as a mark, nor ever was, any more than of a pound sterling; but it is well known that in the ancient computations a mark was reckoned at 13s. 4d.: five marks, therefore, must amount to 66s. 8d. a great sum to be paid out of these tithes; and especially when it is considered as a reservation made above four hundred and fifty years ago, when money, at a moderate computation, was worth at least ten times as much as it is now. In *Dugdale's Hist. of St. Paul's*, p. 32, and *Bishop Fleetwood's Chronicon Pretiosum*, p. 83, it appears, that in the year 1302, which was within seventeen years of the date of the grant in question, wheat was sold by the quarter at 4s., malt ground at 3s. 4d., and other things in proportion; a bull at 7s. 4d., a cow at 6s., sheep from 1s. to 8d., a capon 2d. It cannot, therefore, be taken but that the original intent of the grant in question was to reserve the *decimæ garbarum* to the religious house in the fullest latitude and extent of the word; for taking it otherwise it might be rather a charge than a bounty to supply their losses, and to serve for maintenance and hospitality.

1759.

~~~~~  
 SIMS  
 v.  
 BENNETT.


[ 399 ]

The *Solicitor-General* in reply.

This question, which is of very great importance, and quite new as far as the present case extends, arises solely out of the endowment. Where an endowment is presumed, the question must be determined by usage; and usage may also explain a doubtful endowment; but as the present endowment appears without usage either to assist or explain it, the case must be decided by the construction put upon the instrument.

The words of the endowment are *decimæ hortorum*, which *Wallis v. Paine* has decided to be *minutæ decimæ*. There are two *criteria* by which great and small tithes may be judged of. First, the species; second, the use and application of them. The latter is the surer, as the true quality cannot be known till severance. In *Smith v. Huggins* in the Exchequer, 24th June, 1752, where the plaintiff, being a vicar endowed of small tithes, brought his bill for an account of tithes of hops, to which it was objected by the defendant, that though hops in a garden are small tithes, yet, that being planted in great quantities in the parish, they ought to be considered as great, and not as small tithes. And in support of this objection, it was said, that peas and beans sown in a garden are small tithes, but in open fields are to be considered as great tithes; but the court, with great clearness, over-ruled this objection, saying, that small or great tithes are not to be distinguished by quantity, but from the nature of the things themselves: that hops are clearly in their nature a small tithe, and that peas and beans, when cut green, are small tithes, though sown in open fields, and though sown in never so great quantities; but that if they are left to come to maturity, and consequently to be grain, they are then great tithes. It is no objection to the vicar's demand, that a double tithe might be payable for the same thing, by the vicar having the beans and

peas when gathered green, and another tithe to the rector when the stalks ripened and were cut down. It would be merely dividing the same tithe between two different owners, according to the grant of appropriation. Nor is this an objection of any weight, that the farmer would have it in his power to determine the property of the tithes between the rector and the vicar. Tithes are in their nature a fluctuating and uncertain inheritance: the occupier may cultivate his land as he and his landlord think proper; nay, they may even leave it waste, and deprive both of their tithes. If, after all, it is still doubtful whether this be a small tithe in its nature and quality, the question will be, whether the defendant has proved himself entitled under the word *decimæ garbarum*. Beans and peas, gathered green, neither *solent nec possunt ligari*.

1759.  
  
 SIMS  
 v.  
 BENNETT.

[ 400 ]

*The Lord KEEPER.*

This is a bill brought by the vicar of *Eastham* for 10th November. tithes of beans and peas gathered green, and sold in the market. The bill seems to admit, that had these beans and peas come to maturity, the rector would have been entitled to them; and therefore the question is, whether, from their being gathered green and sold in the market, the vicar is entitled.

The rector is of common right entitled to all sorts of tithes: the vicar can claim against the rector only by endowment or prescription; and therefore in *Spring's* case, *Moor* 761, it is holden that a rector cannot prescribe against a vicar endowed; because where an endowment is, no prescription can prevail against it. So in the same book, 910, *minutæ decimæ* carry not the tithes of glebe lands, because the endowment goes no further than the words of the donation carry it.

1759.

SIMS

v.

BENNETT.

[ 401 ]

In this cause it appears from the evidence, that the usage of gathering green is new and modern, occasioned, perhaps, by the increase of the inhabitants in this town and neighbourhood; but be that as it will, the plaintiff, the vicar, is in possession of no such right to the tithes of beans and peas gathered green, &c. by prescription. And the fact of usage giving the vicar no such right, I cannot decree for him upon his claim, until it is established at law, to be the law that the vicar is entitled to the tithes of such beans and peas.

But the endowment has been insisted upon on the part of the vicar, and this has been treated as a new case; and as it has been mentioned so to be by the counsel on both sides, I shall give my thoughts upon it.

That tithes are due *jure divino* is a doctrine now exploded; the right therefore depends upon municipal laws. By those laws the demand is given *de communi jure* to the rector, and the vicar's right can be only by endowment, or by prescription and usage as evidence of an endowment. There being no prescription in this case, it brings it to a question of construction upon the words of the endowment.

The endowment was made by the Bishop of *London* before any statutes relating to endowments: the words are, "*Vicarius habeat et percipiat decimas hortorum, ac omnimodas decimas, præter decimas garbarum fæni et molendini.*" It has been insisted that beans and peas gathered green could not be *garba*, and therefore could not go to the rector; for that *garba* signifies *grain* bound up in a sheaf, which beans and peas gathered green could not be; but this is a fallacy, for when the law speaks of *garba* or sheaves, it speaks of the whole produce, stalk and all. The word *garba* means *quod ligari potest*, and probably peas were actually garbed when the word was



introduced into the canon law; but since that, barley, oats, and peas are not garbed, and wheat continues to be garbed, because the straw is of value, and to preserve it unbroken, and yet barley and oats are *decima garbarum*, which words carry great tithes in contradistinction to vicarial tithes. *Spelman* explains *garbæ* to be such fruits of the earth as are naturally fit to be bound, and *Lindwood* explains it the same way. It follows, therefore, that *garba* means and refers to such grains as, when come to maturity, were usually or might be bound together, and does not extend to things improper to be bound.

The old cases make the nature of the thing to be the distinction between small tithes and great tithes. So is *Udall v. Tindall*, *Cro. Car.* 28. *Wharton v. Lisle*, 4 *Mod.* 103. and *Bedingfield v. Frake*, *Moor.* 909, where corn was holden to be great tithes in a garden; and the modern cases concur with the distinction. *Nicholas v. Elliott*, in *Bunbury*, is unintelligible in itself, but has light given to it by *Gumley v. Burt*, in *Bunbury*, where the distinction is holden.

There have been cited *Stephens v. Martin*, and *Nicholas v. Elliott*, against the distinction, and no other cases. The first case is answered by its being observed, that in that case it did not appear what the endowment was, or whether the impropiator contested it (*a*). And as to *Nicholas v. Elliott*, it appears by *Gumley v. Burt*, that the usage in that case made the difference. These cases prove these two propositions: First, That the vicar has no claim to tithes but by endowment or prescription. Secondly, That where the endowment is not by special

(*a*) This however does appear by the report of that case in *Bunb.* 170. and also by the respondent's printed case. *Gw.*

1759.  
Sims  
v.  
BENNETT.

[ 402 ]

1759.

SIMS

v.

BENNETT.

[ 403 ]

but by general words, as *minutæ decimæ*, the law distinguishes between the tithes, according to the nature of the thing; and the mode of the cultivation, as in a garden-like manner, does not alter the tithes, as in *Gumley v. Burt*: much less can the mode and time of gathering alter the right, which has attached in the rector before the time of gathering. The rector is entitled at the time of committing the grain to the earth, and it would make his right strangely precarious and uncertain, to put it upon the management of the owner: if that were the case, then a great tithe, gathered before it comes to maturity, would be a small tithe; and yet in *Hodgson v. Smith*, in *Bunbury*, tares cut, whether green or ripe, are a great tithe. Nothing breaks into these resolutions, but that the *Exchequer* have determined the tithe of clover-seeds to be a small tithe. The reason the *Exchequer* made the difference between seed and the other cases, was not grounded on reasoning, but on authority. It was because Lord *Coke* laid it down that seeds were *minutæ decimæ*, and the court of *Exchequer* did rightly in conforming with that rule as it was established; and therefore that case of seeds is to be considered as an exception to the general rule, and does not vary the rule itself: but this exception has never been carried further than to seeds, not to grain.

But another distinction has been taken from the application of peas and beans to sustenance of man, not of cattle; but this will not hold, as it would go too far, for if things are small tithes because used for the sustenance of man, it would comprehend all grain, as barley for beer or bread, and oats for bread or family uses.

Therefore I am very well satisfied, in point of law, that these tithes are rectorial; but if I had not been so, I should have decreed against the plaintiff for want of en-

joyment. Let the bill be dismissed; but, as it is a new case, without costs on either side.

1759.

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SIMS

v.

BENNETT.

This decree was afterwards affirmed in the *House of Lords*, 7th December, 1762. 7 Bro. P. C. Ed. Toml. 29.

1905. 1 Ch. 196.

[404]

Duke of MARLBOROUGH v. Earl GODOLPHIN.

1759.

21st & 23d July.

16th November.

S. C.

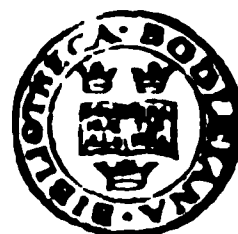
Core, MSS.

Perryn, MSS.

Sewell, MSS.

Et è contra.

(Reg. Lib. A. 1759. fol. 78.)



JOHN, Duke of MARLBOROUGH, upon whom, by certain acts of parliament, the honour and manor of *Woodstock*, and a pension of £5000 *per ann.* were limited and annexed for ever to go along with his titles, with a view of communicating the same unalienable qualities to his own private property, by a deed of covenant with *John*, Duke of *Montagu*, and certain other trustees, made subject to revocation by deed or will, bearing date the 17th of November, 1712, covenanted to assign and pay to the said trustees ready money and securities to the amount of £400,000 in trust, to be disposed of in purchasing lands and hereditaments, to be conveyed in manner therein mentioned, so long as by law might be, to go along with his honour and dukedom of *Marlborough*, with several directions and powers, and (*int. alia*) to revoke the uses in tail male to be limited to persons not in being, when they should be respectively born, and in lieu thereof to limit the same to them respectively for their lives. And vocation and resettlement was void, as tending to a perpetuity, and being repugnant to the estate settled.

Testator devises his real estates to trustees, to several persons for life, with remainder to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male: held, that this clause of revocation and being repug-

1759.


~~~~~  
 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN.

[ 405 ]

he directed his said trustees, within seven years after his death, to apply for an act of parliament to make these premises unalienable.

By his will, bearing date the 19th of *March*, 1722, after reciting the preceding deed, and that he had made a subsequent will and codicil, he thereby revoked the same; and to the intent that there might be one entire settlement and disposition of his whole estate, real and personal; and for continuing his estates, or the greatest part thereof, in the descendants from him, so long as might be by law; he gave and devised all his lordships, manors, messuages, lands, tenements, and hereditaments, situate in the several counties of *Northampton*, *Oxford*, *Wilts*, and *Hertford*, or elsewhere in *England*, not settled by act of parliament, &c. to *Sarah*, Duchess of *Marlborough*, *John*, Duke of *Montagu*, *Scroope*, Duke of *Bridgewater*, the plaintiff, *Francis*, Earl *Godolphin*, and other trustees, their heirs and assigns, to the several uses, &c. thereafter mentioned: viz. To the use of *Harriot*, then Countess *Godolphin*, for life; with remainder to trustees to preserve, &c.; remainder to *William*, Lord *Ryallton*, son and heir apparent of the said Earl and Countess *Godolphin* for life; remainder to trustees to preserve, &c.; remainder to his first and other sons in tail male; remainder to all other the sons of *Harriot*, Countess *Godolphin*, successively in tail male; remainder to *Robert*, Lord *Spencer* (eldest son of *Anne*, Countess of *Sunderland*, testator's second daughter) for life; remainder to trustees to preserve, &c.; remainder to his first and other sons in tail male; remainder to *Charles Spencer* (her second son, afterwards Earl of *Sunderland*, and late Duke of *Marlborough*) for life; remainder to trustees to preserve, &c.; remainder to his first and other sons in tail male; remainder to *John Spencer* for life, with remainder to his first and other sons in tail male, with several remainders over.

Then followed this clause : “ And for default of such issue, to all and every other the issue male and female lineally descending of or from me, in such manner, and for such estate, as the same are hereinbefore limited and declared to the beforementioned issue of me ; it being my intention that the said premises shall continue, remain, and be vested in all the issue of me, so long as any issue male or female shall be, to be held or enjoyed by them severally and successively in manner and form aforesaid ; the elder, and the descendants of every such elder issue, to be preferred before the younger of such issue, as long as by the laws of the realm it may be,” and for want of such issue, to the testator’s right heirs for ever.

1759.  
  
 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN.

[ 406 ]

The will then contained the following clause : “ And I do hereby empower and direct my trustees, the said *Sarah*, Duchess of *Marlborough*, &c. and the survivors and survivor of them, and the heirs and assigns of such survivor, on the birth of each and every son hereafter to be born of the said Lord *Ryalton*, and also of the said *Harriot*, Countess *Godolphin*, and also of the said Lord *Spencer*, *Charles Spencer*, and *John Spencer*, and also of the said *Mary*, Duchess of *Montagu*, and also of the said *Harriot*, Duchess of *Newcastle*, and also of the said *John Bateman*, and also of the said Lady *Ann Bateman*, and also of the said Lady *Di Spencer*, and also of the said Lady *Ann Egerton*, and also of the said Lady *Isabella Montagu*, and also of the said Lady *Mary Montagu*, by deeds attested by two or more credible witnesses, to revoke and make void the respective uses limited to their respective sons in tail male ; and in lieu thereof, to limit the premises to the use of such sons for their lives without impeachment of waste, with immediate remainders to the respective sons of such sons, severally

1759.

~~~~~  
 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

[407]

and respectively in tail male, according to the seniority of the said sons."

The testator then devised the residue of his personal estate to his trustees, to be laid out in land, and to be settled and secured "to the several uses, trusts, intents and purposes, and by and under all and every the limitations, powers of revocation, and other powers, conditions, restrictions and agreements as are hereinbefore limited, directed and appointed of, for and concerning my real estates before devised."

Then came the following clause: "And I do hereby intreat his most sacred Majesty, the lords spiritual and temporal, and commons in parliament assembled, or to be assembled, that an act of parliament may be had and obtained for settling my real estate hereinbefore devised, or to be purchased, with my personal estate, pursuant to this my will; and also my goods which shall be in *Blenheim House*, or *Marlborough House*, at the time of my decease, to such uses, and according to my intentions expressed herein; and that the same may be unalienable as the honour of *Woodstock* and house at *Blenheim* are made by the said recited act of parliament of the fifth year of her said late Majesty; and I do hereby direct my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, in humble manner, to apply for obtaining such act of parliament for the purposes aforesaid."

The testator died on the 16th of *June*, 1722, without issue male; and the Countess *Godolphin*, Lord *Ryalton* her son, and Lord *Spencer*, having died without issue; and *Charles Spencer*, the second son of *Anne*, Countess of *Sunderland*, having become Duke of *Marlborough*; a bill was filed in *Trin. Term*, 1738, by the Duchess dowager of *Marlborough*, and the other surviving trus-

tees, against *Charles*, late Duke of *Marlborough*, (and by supplemental bill against the present Duke, his eldest son, and also against *John Spencer*, third son of the said *Anne*, Countess of *Sunderland*,) praying to have the purchases then made by the trustees approved of; and that the residue of the trusts unperformed might be carried into execution by the direction of the court, and a settlement made of the trust estate pursuant to the will, and for that purpose the proper accounts to be taken. The several defendants put in their answers to that bill; and the late Duke of *Marlborough* and *John Spencer* both insisted that their several sons ought to be made tenants in tail.

1759.
 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

The cause came on to be heard before Lord *Hardwicke*, 20th *June* 1740, when accounts were directed, and directions given for investing the remainder of the personal estate in the like purchases, with the Master's approbation; and the consideration in what manner the settlement of the said estates ought to be made, was reserved: for which his lordship declared he would request the assistance of the three Chiefs.

[408]

On the 28th of *November*, 1758, *Charles*, Duke of *Marlborough*, died, leaving *George*, Duke of *Marlborough*, and Lord *Charles* and Lord *Robert Spencer*.

The bill in the first of the two causes, which were now set down to be heard, was then filed, to which Lord *Charles* and Lord *Robert* were defendants: it prayed to have a conveyance from the trustees of all the freehold and leasehold estates devised by the testator, or since purchased with the residue of his personal estate, so as that the plaintiff, the said Duke, might be rendered tenant in tail male of the said freehold estates, and that the leaseholds might be absolutely vested in him; and that the remaining personal estate might be immediately vested in like manner.

1759.

~~~~~  
 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Holkins* for the Duke of *Marlborough*.

The greatness of the property is the sole cause of the solemnity with which this case has been introduced, for the question itself is not one of any difficulty. The plaintiff comes here for an execution of the trusts contained in the will. The only question is, how they are to be executed? The intent of the testator is apparent, viz. to create a perpetuity; and this is to be done by reducing the estates tail into estates for life: but if such an attempt is not good at law, this court will never be made the means of effectuating it.


[ 409 ]

The common law will not suffer an estate to be unalienable for a longer period than a life or lives in being, and a few years afterwards: this is now so clear and established a maxim at law, that it would be impossible to avoid it. This clause, indeed, goes no further than the first succession after the lives in being; but if it is to be allowed to go so far, why may it not go still further? Why may it not go *ad infinitum*? When once the known legal limit is passed, the same reason that holds good for one, will justify the other. Before the statute *de donis*, estates were fee-simple conditional; and when issue was born the condition was at an end, and they became absolute: that statute was the introduction of estates tail. It was soon found, however, that its rigour militated against the interest and policy of a commercial nation; the law leant against it, and allowed discontinuances, warranties, and common recoveries. *Craig*, *Jus Feudale* 151. In *Corbet's* case, 1 Co. 83. *Sir Anthony Mildmay's* case, 6 Co. 40. *Mary Portington's* case, 10 Co. 35. *Pierce v. Winn*, 1 Vent. 321. *Foy v. Hynde*, Cro. Jac. 696. *Sonday's* case, 9 Co. 128. *Collins v. Plummer*, 1 P. W. 104, and in numerous other cases, attempts were made to



restrain the power of alienation (*a*). They all of them, however, failed. It was not then apprehended that a person unborn could be made tenant for life, with limitations over to his heirs (*b*). The reasons given in those and other cases for these determinations, are for the most part \*technical, and not substantial. The true reason is, the abhorrence in which the law holds all perpetuities.

After the statute of uses, the experiment was again tried under cover of that statute. *Chudleigh's case*. That was a limitation to *A.* for life, remainder to his first and other sons; remainder to *A.* in fee. It was there determined, after very great deliberation, that the contingent uses might be barred by tenant for life. The result of this case was, the introduction of limitations to trustees

1759.  
  
 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN.  
 [ \*410 ]

(*a*) Vide *King v. Burchell*, next case, and note to it.

(*b*) This is the only trace in the note-book of this part of the argument: in the printed cases in the *House of Lords* it was otherwise, of which Lord *Kenyon* has thus given the reason. "I remember hearing Lord *Mansfield* say, that when the case alluded to was to be argued in the *House of Lords*, there was found to be a mistake in the printed reasons on the part of those who opposed the execution of the power in the manner intended; for it had been stated that there could not be a limitation to an unborn child *for life*; but that was

found to be wrong, for certainly there may be such a limitation: they therefore cancelled that reason, and framed another, stating the proposition to be, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child in succession: and that doctrine was distinctly laid down by the learned judge who delivered the opinion of the judges in the *House of Lords*." *Brudenell v. Elmes*, 1 *East*, 452. *vid. post.* 416. See, also, his lordship's observations in *Hay v. the Earl of Coventry*, 3 *T. R.* 86.

1759.

~~~~~  
 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

[411]

to support contingent remainders before they come *in esse*. But the estates tail unalienable were found to be a general inconvenience, yet a certain degree of perpetuity was found to be necessary to answer the exigencies of families; and therefore springing uses, executory trusts, and executory devises were introduced. In *Stanley v. Leigh*, 2 P. W. 687, Sir Joseph Jekyll gives a definition of a perpetuity; he says, it is a legal word or term of art, and is the limiting an estate either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time and some short or reasonable time afterwards. This, in the case of an executory devise, has been allowed to a certain extent. *Hinde v. Lyon*, 3 Leon, 64. *Duke of Norfolk's case*, 3 Ch. Ca. *Massenburgh v. Ash*, 1 Vern. 304. It has never, indeed, yet been judicially determined what the utmost limits are to which a perpetuity may be carried; but according to Lord Nottingham's observations, whenever any visible inconvenience arises this court will remedy it.

Here then is a new attempt to effect what has been so long guarded against, which is to be done by a succession of tenancies for life, to be raised by a revocation of the old, and a declaration of new uses. But *And. 337*, in *Chudleigh's case*, expressly declares, that a succession of tenancies for life is bad. In *Humberston v. Humberston*, 1 P. W. 332, they were only allowed so far as not to tend to a perpetuity; and in the case of *Hucks v. Hucks (a)*, 31st July, 1754, *J. Hucks*, in marriage articles, had covenanted to settle lands of £200 *per ann.* on the wife for life; remainder to trustees to support contin-

(a) There is a short note *Marlborough's will* is alluded of this case, 2 Ves. 568, where to.
 this clause in the Duke of

gent remainders; remainder to the first son begotten on her body, and to the first son of such first son, and so on. When it came on, the point was considered by the counsel as too clear to be argued, and the question was given up. In *Bland v. Bland* (a), 1745, (which was determined upon another point,) there was a similar clause, but it was not argued.

Mr. Sewell, Mr. de Grey, and Mr. Comyn, for Lord Charles and Lord Robert Spencer.

The same policy of the law, which will not permit estates to be fixed unalienably in one family for ever, will support and protect the means of preserving them till they come to the point at which the mischiefs of perpetual restraint commence.

It is said that this is a perpetuity, and that therefore it ought not to prevail: if it is a perpetuity it certainly ought not to prevail; but it neither is a perpetuity, nor is there any danger of its becoming so. It is merely the case of a simple power vested in the hands of trustees to revoke former uses, and limit *de novo*: it is true that an estate cannot be limited to a person unborn for life, with remainder to his first son as a purchaser either for life, or for an estate of inheritance (b). But though this cannot be done by limitation and *per directum*, yet this court, which professes to regard the intent of testators, will allow it to be done *arte vel ingenio*, and *per obliquum*. There is no power in this court to say that this power of revocation is void. An estate tail may be made defeasible upon condition. A bond and covenant not to suffer a recovery are good, and would be supported in this court: a limitation over to a stranger on the birth of the duke would have been good. We know to what extent this court has as yet permitted estates to be rendered unalienable; but

1759.

Duke of
MARLBOROUGH
v.
Earl
GODOLPHIN.

[412]

(a) Since reported, 2 Cox, 349. (b) *Vide ante*, p. 409.

1759.

Duke of
MARLBOROUGH
v.
Earl
GODOLPHIN.

it has not yet drawn any line, and said where testators are to stop. In the estates, therefore, which remain to be executed, the duke must be made tenant for life. If a testator declares his intent to make a perpetuity, and to go beyond the limits prescribed by law, the court will go as far as it can in effectuating such intent. It did so in *Humberston v. Humberston*. It directed the insertion of a limitation to after-born sons as tenants for life. In the *Earl of Stamford v. Sir J. Hobart*, and all those cases which are called executory (a), the court, in ordering a conveyance, would follow the intent of the testator as far as the rules of law would permit.

[413]

There is no instance where this court has interposed to defeat a testator's attempts to establish a perpetuity, except in those cases where the attempt was absolutely repugnant to the rules of law; it having a *tendency* only to a perpetuity, is not enough to affect it. The court may refuse to interfere, and leave the surviving trustee to act at his discretion. In *Woodhouse v. Hoskins* (b), it refused to order trustees to join to destroy the contingent remainders. In *Frewin v. Charleton*, 1 Eq. Ab. 386, and *Winnington v. Foley*, 1 P. W. 536, it directed trustees to join for the express purpose of making a new settlement, and thereby preserving the estate one degree longer in the family (c).

But supposing that the trustees had executed this power upon the birth of Duke Charles's sons, a court of equity would not have interposed to impeach it; and it being a power which the trustees were enjoined to


(a) *Fearne*, C. R. 118, et seq. the whole of the doctrine on this subject most elaborately

(b) 3 Atk. 22.

discussed, *Moody v. Walters*,

(c) *Fearne*, C. R. 326, et seq., and see the cases, and 16 Ves. 283.

execute, the court should have considered it executed from the time when it was directed to be so. The present power indeed is unusual, and has never happened to come before the court, but it is not unknown, and has frequently been inserted in settlements. The restraint which is so much dreaded will not be very alarming, as it cannot go beyond the sons of the persons named in the will, the immediate descendants of such sons will be tenants in tail, and have a power of alienation.

1759.

 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

The Lord KEEPER.

The two bills that are now depending for determination, are both brought to have the directions of the court concerning the executions of the trusts in the will of *John, Duke of Marlborough*. (Here his lordship stated the prayer of the first bill, &c.) 16th November.

This cause came on to be heard in *June, 1740*, and several directions were given by the then Lord Chancellor, touching the accounts, application of the surplus, and other matters; but a question arising, “as to the power given by the testator’s will to the trustees to revoke the uses thereby limited to the first and every other son of the respective tenants for life, and to limit the premises to the use of such sons for their lives only;” and also, “whether, in consequence thereof, the defendants, the *Marquis of Blandford* and *John Spencer*, the infants, were entitled to limitations in tail, or for life only, in the settlement to be made of the estates; his lordship declared that he would be assisted by the two Chief Justices, and the Chief Baron, in the determination of that question. He reserved it, and the cause as to that point has never been set down till now for a determination.

[414]

The other bill is brought by the present Duke of *Marlborough*, principally with a view of having that

1759.

Duke of
MARLBOROUGH

v.
Earl
GODOLPHIN.

question determined, and a legal title in tail conveyed to him by the trustees accordingly. The other cause is set down upon the point reserved, to have a determination also.

The reason why I have not pursued the same plan as the learned and noble Lord laid down is this, that the point in question is entirely new, and, if it cannot be determined upon principles and reasons that afford a general satisfaction, the property is so immense, and the family so great, that I think it should be determined by the supreme judicature of this nation; especially as in one event it will lock up property, and keep it *ex commercio*, far longer than can at present be done by any known or practised method of conveyancing. (Here his lordship read the principal part of the will.)


[415]

The grand question upon these two bills and the will of *John, Duke of Marlborough*, is, whether I should, according to the prayer of the present Duke's bill, order the trustees to convey to him the new purchased lands as tenant in tail, or as tenant for life; and at the same time order the surviving trustee to revoke the uses of the will, so far as they relate to the limitation of estates tail to *Duke George* and his brothers, and to *Mr. Spencer*, and to direct limitations to them of those estates, for life only. And this question will depend upon the effect of the revocatory clause, coupled to a trust estate, which can alone be carried into execution by the aid and assistance of this court.

It is agreed on all hands that this clause is new (a), and that though it has been privately fostered by a par-

(a) This is not strictly power was first invented by the case, *Lord Hardwicke* in *Lord Nottingham* and his brother *Mr. Finch* (afterwards *Earl of Aylesford*). *Bland v. Bland*, 2 *Cor*, 356, alluding to this very will, observes, that this species of

ticular family, from whence it issued, it never obtained any credit so as to be adopted by lawyers and conveyancers. Indeed it is so new, that it has acquired no name or species; for the counsel have called it a power, to which it has no resemblance, since it is imposed on the trustees as an act of necessity, whereas a power is, a *facultas agendi vel non agendi*.

1759.

 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

It being, therefore, a clause directory and compulsory to the trustees, (for every legal direction this court will compel a trustee to perform,) the provision is in substance neither more nor less than this: a clause in the Duke of *Marlborough's* will, in which he makes his great grandson, the present Duke (who was at the time of the making this will unborn,) tenant for life, with a limitation to the sons of such grandson as purchasers in tail.

It is agreed that the Duke of *Marlborough* could not have done this by limitation of estate; because, though by the rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life, or as an inheritance; yet a remainder to the issue of such contingent remainder-man as a purchaser, is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover (a).

[416]

Why the law disallowed these kind of limitations I will not take upon me to say; because I have never met, in the compass of my reading, with any reason assigned for it: and I shall not hazard any conjecture of my own, for technical reasons upheld by old repute, and grown reverend by length of years, bear great weight and authority; but a new technical reason appears with as little dignity as an usurper just seated in his chair of state. So far, however, is plain, that the common law seemed wisely to consider that the real property of this state ought, to

(a) *Vide ante*, 410, 411.

1759.

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 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN.

a degree, to be put in commerce, to be left free to answer the exigencies of the possessors and their families, and therefore admitted no perpetuities by way of entails; and though it allowed contingent remainders, it afforded them no protection.

The dissipation of young heirs, the splendour of great families, the propriety of annexing sufficient possessions to support the dignities obtained by illustrious persons, afford specious and colourable arguments for perpetuating and entailing estates; but in a country of trade and commerce, to damp the spirit of industry, and to take away one of its greatest incentives, the power of honourably investing acquisitions, would produce all the mischiefs and inconveniences of the statute of entails: and therefore the safety of creditors and purchasers make it, in my opinion, a matter of the highest importance, that the law should be fixed and certain with respect to the limitations of real property in family settlements; not subject to be questioned upon whimsical inventions, started (though by the ablest men) in order to introduce innovations in fundamentals.


[ 417 ]

One would think it strange that it should be admitted, (particularly in a court of equity, the jurisdiction of reason) that the Duke of *Marlborough* could not limit his estate to Duke *George* for life, with remainder to his sons in tail male, because it is locking up the estate beyond the duration allowed by law, but that he may deliver the keys to another, and empower him to do that, which he himself could not. That we should be arguing thus—This act prohibited by general policy *non potes facere per teipsum, sed potes facere per alium—non per directum, sed per obliquum*. For all the maxims of general good sense and everlasting reason are maxims of equity, but not rules in law.

The power and pride of the nobility introduced the



statute of entails and perpetuities. The reluctant spirit of English liberty (depressed as it was before the revolution) would not submit to it; and *Westminster Hall*, siding with liberty, found means to evade it. Recoveries were established, by which alienations were introduced, contrary to the intent of the statute. What were the attempts made to frustrate this method of barring estates tail? Provisoers and conditions not to alien, with a cesser of the estate on any such attempt by the tenant. What was the determination of the judges? You shall not give a legal estate, and divest it of legal incidents. You shall not by condition restrain an estate tail from being alienable, by the mode in which the law allows it to be aliened, nor restrain a tenant in tail from barring his issue by fine; nay, you shall not restrain a tenant in tail from committing waste; his wife from being endowable: or the husband of tenant in tail from being tenant by curtesy.

1759.  
  
 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN,

It seems to me most surprising, that after these puerile attempts had been made upon the narrow, fettered, and technical reasonings of courts of law, and been rejected and exploded with contempt and derision, that it could ever have entered into the head of man to think, that he could subvert the fundamental principles of property, by the aid of this court.

[ 418 ]

This court considers all arguments and reasonings in the abstract, unclogged by any thing but the system of the law which it is bound to follow; I trust that it will never be so blind as not to see the legal limits; I hope it will never be so arbitrary as to transgress them.

This court has no discretion to say how far perpetuities are to extend, and where they are to stop; the duty of this court is to give trusts the same extent as legal limitations, and to make the system of law and equity uniform.

It was said in the argument on this case, that it is determined that a person may, by executory devise, make

1759.

~~~~~  
 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

[419]

an estate unalienable for one life in being, and twenty, or twenty-one years after, but that the time not to be exceeded is nowhere defined, therefore that I might as well extend it *beyond* that period, as others have to it. It is true that by executory devise, an estate may be locked up for a life or lives in being, and twenty or twenty-one years after: and that is in conformity to the course of limitations, and the methods of conveyance at law; for a limitation may be to one for life, with remainder to a person unborn in tail or in fee. If there are trustees to support contingent remainders, the remainder cannot be barred by the tenant for life, nor can it be conveyed by the remainder-man till he attains the age of twenty-one (a). Therefore the sages of the law have properly allowed a perpetuity as far in executory devises, which are accommodated to the exigencies in families, as in legal limitations. But at the determination of the period of one life, and twenty, or twenty-one years, the estate is alienable. Whereas, could there be a succession of estates for life, with remainder to the issue of such tenants for life, the inheritance is locked up till the estates for life are all spent, and the remainder-man of the inheritance is twenty-one. As for instance, in the present case, had Duke *Charles* lived to seventy, and then had a son, and that son had lived to

(a) This is one of the numerous authorities which establish that the period of twenty-one years and a few months after a life or lives in being, as the term after which an executory devise may be limited to take effect, is only allowable *with reference to the birth and infancy of the devisee*. This was particularly noticed by Lord *Alvanley*, in *Thellusson v. Woodford*, 4 *Ves.* 337, in allusion to an observation made by Mr. Justice *Buller* in that case, *et vide* S. C. 1 N. R. 393. *Long v. Blackall*, 7 T. R. 102. *Beard v. Westcott*, 5 *Taunt.* 405. *Sugd. Gilb. on Uses*, 260, n., and the authorities there cited.

the same age, and then had a son, the inheritance could not have been charged or disposed of, in less than 160 years: and unless the rules of limitation are adhered to, I cannot see any reason why this equitable modification might not as well be extended to any remoter generation than in the present will.

I have thus far considered this case upon its general tendency to a perpetuity, beyond what I conceive the rules of law allow; I shall now consider it particularly with regard to the operations it would have upon this family settlement, and the endless disputes, questions, and expenses such unusual clauses have been, and always will be productive of.

In the first place, all the real estates Duke *John* was possessed of, are limited to the present Duke *George* in tail, and vested in him on his birth. I omit the absurdity in law, that the same person should limit an estate in remainder, and destroy it the moment it comes into possession.

But I want to know what this clause is. Is it a power? If so, it is discretionary in the trustees to execute it or not. But then, when are they to exercise their discretion as to the execution or non-execution of it? By the penning of the clause it is plain the testator intended the trustees, the survivors, and survivor of them, should be *enabled* to revoke. But when? At any time? There is nothing in the clause that imports it; no: they were empowered on the birth of each and every respective son and sons. Will it be said, that if they were empowered to revoke on the birth of a son, this court will enable and order them to execute that power, of which they have waived the execution? Suppose the clause had been penned with a greater latitude (I am now speaking of it as a power, as the court on the former hearing, and the counsel on this have called it), and the trustees had been em-

1759.

Duke of
MARLBOROUGH

v.
Earl
GODOLPHIN.

[420]

1759.

Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

powered and directed to revoke within one year after the birth of a son; could this court have extended the period, and supplied the defective execution of that power, in order to divest Duke George's estate?

But I really am of opinion Duke John never intended it as a power, in the accurate sense and obvious meaning of that word. He intended the revocation absolutely to take place, in case the events to which it applied ever happened; and to have perpetuated the estate one degree longer than usual by means of this *arsenum*, with which his lawyers had flattered his then predominant passion. The word *impower* seems to me to have been used in the will from a poverty of language in the drawer of it; as the word *direct* was to ensue, the properer expression would have been, *enable and direct*, for the word *impower* was used only to transfer a part of the old dominion to trustees, who were enjoined to execute the direction.

[421]

Perhaps it will then be said, if it be a trust enjoined the trustees to execute, then it remains during the particular estate, and the non-execution of the trustee cannot prejudice the *cestui que trust*, and the court must consider it as done on the birth, and order at any time a revocation and new limitation, with a relation to the birth. And what would be the consequence of this doctrine? If the present duke had enjoyed the estate for forty years as tenant in tail, had cut timber and spent the money, a bill is then brought by a remainder-man to have the settlement made pursuant to this clause, I must order him to refund perhaps £100,000, which he had innocently spent as his own money. Suppose he had married while he was tenant in tail, I must declare him tenant for life, revoke his estate tail, and strip his wife of her jointure; nay, perhaps after his death. And all leases executed by him as tenant in tail would become void, and the tenants be defeated of their estates and improvements.

And here I cannot help taking notice of an observation of that great writer Lord *Bacon*, on the attempt to make a perpetuity by the introduction of a proviso conditional, which seems to me to be the same in substance with the present attempt. These “perpetuities”, said he, “if they should stand, would bring in all the former inconveniences subject to entails that were cut off by the former mentioned statutes, and far greater, besides raising unkind suits, setting all the kindred at jars, some taking one part, some another, and the principal parties wasting their time and money in suits of law; so that in the end they are both constrained by necessity to join in the sale of the land, or a great part of it, to pay their debts, occasioned through their suits.” (a)

In pointing out a few of those various disputes that necessarily spring from these innovating clauses, I think I collect the strongest reasons why the law will not admit them, and why every court should without hesitation pronounce them void. If the law would permit the confinement of an estate beyond a life in being, and the time for a remainder-man’s minority to expire; as the law is a system, it would have certainly allowed it to be done by way of limitation, where, the estate being limited, the extent of the owner’s dominion is visible to all who transact with him; and the end of the law is in this country only quiet and repose. But to say, the law does not allow this by direct limitation, and yet allows the same thing to be effected, by I know not what magic, in the modification of an equitable estate, would be productive of infinite suits and questions, tending to defeat the design of both law and equity, and would make both a system of puerility and jargon (b).

(a) Use of the Law. *Vide* his preface to the 10th Report. Lord Coke’s observations upon

Mary Portington’s case, in (b) See this passage cited

1759.

Duke of
MARLBOROUGH

v.
Earl
GODOLPHIN.

[422]

1750.
 ~~~~~  
 Duke of  
 MARLBOROUGH  
 v.  
 Earl  
 GODOLPHIN.

It was said, however, that I ought upon the authority of the case of *Humberston v. Humberston*, to order the limitations to be made as far as they may by law at the time of pronouncing the decree; and therefore that I ought now to decree an estate for life to the Duke and Mr. Spenceer, with remainder to their sons as tenants in tail. That case is reported by Mr. *Vernon* (a) and Mr. *Peere Williams* (b), and by both reports it looks as if there had been directions in that decree to that effect. But it seemed to me that such a decree, founded on events subsequent to the testator's death, would be very singular, and not warranted by the rules of law or equity. I have therefore looked into the decree in the Register's book, and I do not find any part of the directions that appear to me to justify those observations. The words of the decree, as far as regards this purpose, are, "That the Master do see a settlement made of the residue of the trust estate, pursuant to the will of the testator, with limitations to the several parties named to be tenants for life in the said will, and to the heirs male of their bodies, in strict settlement, according to the course of law; and if any of the parties who are named tenants for life have any issue male living, their names are to be inserted into the deed of settlement." But not as tenants for life, but "according to the due course of law." (c)

[ 423 ]

*per Buller, J.*, in *Robinson v. Hardcastle*, 2 T. R. 250.

(a) 2 Vol. 737.

(b) 1 Vol. 332.

(c) The extract from the Register's book has been inserted by Mr. Cor in his note to that case. Lord *Alvanley*, who like the *Lord Keeper*, had been dissatisfied with the

reports of that case, observed, in *Thellusson v. Woodford*, 4 Ves. 332, 333, that, though he knew he could have trusted to Mr. Cor's statement, he had nevertheless sent for the book: his Honour remarked, "that the words of the decree are not so accurately expressed as might have been expected,

It was further objected, that I should not interpose, but leave the surviving trustee to act at his discretion. But there is no weight in that objection; for, whether this be a power or a compulsory direction to the trustees, whether it be valid or invalid, the testator intended that the Duke of *Marlborough*, the plaintiff, should have his estate executed as soon as conveniently after his birth; he has a right, therefore, now, to have the trust performed, and can have it performed only by the aid and under the direction of this court.

1759.  
Duke of  
MARLBOROUGH  
v.  
Earl  
GODOLPHIN.

Upon the whole, therefore, I am of opinion, and do declare, that the clause of revocation and re-settlement in the will of *John*, Duke of *Marlborough*, is tending to a perpetuity, and as repugnant to the estate limited, is void, and of none effect; and I do order and direct that the surviving trustee do convey the new-purchased premises to the plaintiff *George*, Duke of *Marlborough*, in tail male, with remainders over, and subject to such powers, provisoes, conditions, and restrictions, as consistent with an estate tail, are pursuant to the will of *John*, Duke of *Marlborough* (a).

[ 424 ]

Costs to all parties out of the trust estate.

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This decree was afterwards the 7th of Feb. 1763. 5 *Bra.* affirmed in *Dom. Proc.* on P. C. Ed. *Toml.* 232.

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but he was satisfied that it must mean all the persons named, who were in existence at the time of the testator's death; for it could not be contended that the children, born after the testator's death, should, by the accident of being born before the decree, have estates for life given to them." The case is also reported, and in the same obscure manner, *Prec. Can.* 455, and *Gillb. Eq. Ca.* 128.

(a) A trust of a similar nature was declared void, *Heath v. Heath*, *post.* Vol. II. 330, *Mainwaring v.*

1759.  
 ~~~~~  
 Duke of
 MARLBOROUGH
 v.
 Earl
 GODOLPHIN.

Baxter, 5 *Ves.* 458; see also *petnities*, see *Thellusson v. Bland v. Bland*, 2 *Cox*, 349. *Woodford*, 4 *Ves.* 227, 11 *Ves.* 112, and Mr. Hargrave's elaborate argument, 2 *Jurid. Arg.* 1., and, upon the *cypress* doctrine, see Mr. Butler's note to *Fearne's Cont. Rem.* 203.

On the subject of per-

22d & 23d June,
 8th & 20th Nov.

1759.
 S. C.
Amb. 379.
Hill, MSS.
Perry, MSS.
 [*425]

Devise of an estate at *A.* to *I. H.* for life, remainder to the issue male of *I. H.* and to his and their heirs, share and share alike; and for want of such issue, to the issue female of *I. H.*, and to her and their heirs, share and share alike; and for want of such issue, over: of an estate at *B.* to *I. H.* for life; remainder to the issue male of his body, and to their heirs; and for want of such issue, over; with a proviso to charge the premises for such person as would take next in remainder, in case *I. H.*, or his issue alienate, &c.; *I. H.* had two daughters, and suffered a recovery of the estate at *B.*; held, that he took an estate tail, and that the proviso was repugnant to the estate.

KING v. BURCHELL (a).

(*Reg. Lib. A. 1759. fol. 56.*)

JOHN BLUNT, by his will, bearing date the 26th of October, 1731, devised his estate at *Hunton* and *Linton*, *in the county of *Kent*, to his cousin *John Harris*, to hold the same during the term of his natural life, and from and immediately after the determination of that estate, he gave the same to the issue male of his cousin *John Harris*, lawfully begotten, and to his and their heirs, share and share alike, and for want of such issue, then he gave the same to the issue female of his cousin *John Harris*, lawfully begotten, to her and their heirs, share and share alike, if more than one; and for want of such issue, then he gave the same unto his cousin, *William King*, his heirs and assigns for ever.

(a) This case, which was report in *Ambler*, *Fearne*, originally cited erroneously C. R. 181, but there has been on the argument of *Doe v. Loring*, *Burr.* 1103, was rectified 3 T. R. 145, and in the no report of the judgment yet printed.

The testator taking notice that he had covenanted to settle £50 *per annum* on his wife, devised certain premises in *Maidstone* to her, to hold to her as part of her jointure, for and during her natural life, and from and immediately after the decease of his wife, he gave and devised the same unto his cousin, *John Harris*, for life; and from and immediately after the determination of that estate, unto the issue male of the body of his cousin, *John Harris*, lawfully to be begotten, and to their heirs; and for want of such issue, to his cousin, *William King*, his heirs and assigns for ever.

The testator then inserted the following proviso: " Provided always, and my mind and will is, that the several bequests and limitations of the premises in *Hunton*, *Linton* and *Maidstone*, so devised, bequeathed and limited unto *John Harris*; and such issue male and female, is upon this special condition, that if he, the said *John Harris*, or his issue, or any or either of them, shall at any time or times hereafter alienate, mortgage, incumber, or otherwise commit any act or deed whatsoever, whereby to alter, change or defeat the same bequests and limitations, or any of them hereinbefore limited and appointed of the said premises, that then and in such case, he, the said *John Harris*, and all and every such other person or persons so alienating, mortgaging, or otherwise incumbering, altering, changing, or defeating the same bequests, or any of them, shall pay or cause to be paid, and I do hereby charge the said premises with the payment of £2000 unto such person or persons, and his and their heirs who might, could, should, or ought next to take by virtue or means of any of the bequests, devises or limitations hereinbefore by me given, devised, or bequeathed."

The testator died in 1738. *John Harris* had issue male, which died in the life of the testator. In *Trin.*

1759.

KING

BUTCHER.

1730.

Kipp

Burdell.

Term, 24 & 25 Geo. 2. he suffered a recovery of the premises. He afterwards died, leaving the defendants, *Sarah*, the wife of *Burchell*, and *Mary*, the wife of the defendant *Harridge*, his daughters and co-heiresses.

This was a bill to have the sum of £2000 paid to the plaintiff as a charge arising upon barring the estate tail.

The *Solicitor-General* and Mr. *Wilbraham* for the plaintiff.

Three questions arise out of this case. 1st. Whether *John Harris* was tenant for life, or in tail, under the will of *John Blunt*?

2dly. What is the effect of the recovery suffered by *John Harris*?

3dly. What is the force of the condition? And 1st, Whether it is good or not in point of law? and 2dly, Whether it is barred by the common recovery?

1. The estate is expressly given to *John Harris* only for life; the additional words, after the words of limitation, are a strong indication of his intention, that in case *John Harris* had issue male, they should take the fee, but if he had no issue male, that it should go over. There are two sets of cases, under each of which the first taker has been held to take only an estate for life, and both of them will apply to the present case. The first are where there are words superadded to the words of limitation, in which case, whether the words of limitation be in the singular or plural number, the first taker is only tenant for life, as in *Archer's case*, 1 Co. 66. *Clarke v. Day*, Mo. 593, &c. *Lisle v. Gray*, 2 Lev. 223. *Legate v. Sewell*, Raym. 278. The next class of cases are where the word *issue* has been held to be a word of purchase, and not of limitation, *Luddington v. Kime*, 1 Salk. 224. Lord Raym. 203. *Backhouse v. Wells*, Stra. 731. Those cases in which it has been considered as a word of limitation are only such where the intent of the testator,

that the issue should not take by purchase, has been strongly marked. In the present case it does not. The intent is to be collected from the whole will taken together; as one part gives light to another. *John Harris* could not by any construction be entitled to more than an estate for life under that clause; not only as the superaddition words must be rejected, but because the first taker of the inheritance would take the whole, when the testator meant that it should be divided: another reason is, because there is a subsequent limitation to the issue female, which must be rejected too.

1759.

 KING
 v.
 BURCHELL.

The present case is like *Luddington v. Kime*, having a double contingent remainder, with this difference only, in that case it was expressed, in this it is implied. They are all contingent uses, and concurrent. If issue male, they are to take; if none, then according to the first clause, issue female; and then the remainder-man: in the latter clause the issue female are left out.

2dly. As to the effect of this recovery. If *John Harris* is tenant for life, it is a forfeiture of the estate, and in that case, if the remainders are vested, the next in inheritance is entitled; if they are contingent, the contingency is destroyed, and as the remainder in fee cannot be in abeyance, the heir at law of the grantor is entitled. *Carter v. Barnardiston*, 1 P. W. 505. The inheritance pending the contingency of a remainder descends to the heir. *Beck's case*, Lit. Rep. 159. (a).

[428]

3dly. As to the condition, whether it is good or not at law. One point is observable in all these kinds of conditions, viz. whether they are to restrain a rightful or a tortious alienation; for they must not be repugnant to the nature of the estate given: *Corbet's case*, 1 Co. 83.

(a) *S. C. Boretton v. Nicholls*, Cro. Car. 363. *Fearne*, C. R. 352.

1759.
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 KING  
 v.  
 BURCHELL.

*Mildmay's case*, 6 Co. 40. *Portington's case*, 10 Co. 35. *Richel's case*, Co. Litt. 377 a. But the present condition is not so. For, considering *John Harris* as tenant for life, the destroying the contingent uses is a tortious act. Tenant for life of a trust estate cannot do it since the case of *Penhay v. Hurrell*, 2 Vern. 370. The court will support conditions to restrain tortious acts where they are not repugnant to the estate. Such a condition as the present is of use: it is to charge with £2000. It would be of great use, supposing tenant for life was also entitled to the reversion in fee, with intermediate remainders. Considering *John Harris* to be tenant in tail, the condition is also good, for though a condition is not good to restrain tenant in tail from suffering a recovery, yet a condition not to alien is good, a covenant by tenant in tail not to suffer a common recovery is good. *Collins v. Plummer*, 1 P. W. 104. This is not a case of a restraint, it is an alternative: that is, if you bar the entail, you shall pay, and the estate shall be charged with £2000. A charge of a gross sum, or of an annual payment out of an estate tail, to take place at a future day, would be good, if charged at the time of the creation of the estate. This is no more: it is to take place on the happening of an event.

[ 429 ]

As to the point, whether the condition is barred by the recovery. The distinction is taken in *Page v. Hayward*, 1 Mod. 108. 2 Lev. 28., that where a condition runs with the land, it is not barred by a common recovery, but a collateral condition is. The present is of the former kind.

The *Attorney-General*, Mr. Sewell, and Mr. Webb, for the defendants.

The plaintiff insists that *John Harris* took an estate for life, but whether for life, or in tail, that the proviso conditional was good. As to what estate *John Harris*

took, it is clear that it was an estate tail. Superadded words have the effect of constituting an estate tail only in those cases where the prior words of limitation are in the singular number, as in *Archer's case*, *Clarke v. Day*, &c. or where there are other words so very strongly expressive of the testator's intent only to give an estate for life, that they control the operation of law. The present is most like the case of *Goodright v. Pullyn*, 2 Lord Ray. 1437; there the subsequent words were held not to be sufficient to alter the force of the prior words of limitation. In *Wright v. Pearson (a)*, the same. It may be objected, that the distinction between those cases and the present is, the word used in both of them was *heirs*, but, however, in a will, greater latitude of expression is always given, and *issue* has been held as operative, as a word of limitation, as *heirs*. As to *Luddington v. Kime*, it is no authority here, that devise being penned in a very extraordinary manner. In the present case, if these words are to be considered as words of purchase, this absurdity will follow, that if the eldest son of *John Harris* had died in his lifetime, leaving issue male, the estate would have survived and gone from him. Another argument against construing the present as words of purchase, may be taken from the proviso. It would be ridiculous to suppose that the testator meant to give an unalienable estate to *John Harris*, and at the same time clog the devise of it with a charge, in case of his alienation.

As to the proviso, it is void *ab initio*. It is to restrain what is incident to an estate tail, and therefore void, as it would otherwise introduce a perpetuity. *Jervis v. Bruton*, 2 Vern. 251, *Poole's case*, cit. *Moor*, 809, 810. But even, if the condition is not void in itself, yet, being a subsequent charge, it is barred by the re-

1759.  
  
 KING  
 v.  
 BURCHELL.

[ 430 ]

(a) *Ante*, 119.

1759.  
 KING  
 v.  
 BURCHELL.

covery, which the case of *Benson v. Hudson* sufficiently proves.

The *Solicitor-General* in reply.

*Issue* was originally a word of purchase, and in its technical sense was uniformly considered as such. If the testator's intent, however, requires it, it may be made a word of limitation, but not unless absolutely necessary. Here the sense requires it to be used as a word of purchase, because of the words of limitation superadded, *Shelley's case*, 1 Co. 95 b., which, if the prior words are not construed words of purchase, are inoperative. As to *Wright v. Pearson*, that was determined on the whole context, there was no evidence of testator's intent. *Goodright v. Pullyn* was the same, except that it had no clause for trustees to preserve contingent remainders. In *Higgins v. Dowler*, 1 P. W. 98; *Stanley v. Leigh*, 2 P. W. 686; *Gower v. Grosvenor*, Barn. Ch. Rep. 54, the words default of heirs, or want of heirs, in a case of personal estate, will constitute a contingent remainder, and though there happens to be no instance of a similar rule in real estate, yet from necessity of construction, there may. As to the objection, that the proviso conditional supposed an estate tail, the answer is, that the proviso may be reconciled to an estate for life; for though the father could not, the issue might alienate, and the son, in whom the fee attached upon birth, alienating, as against his issue, would charge the estate. As to the condition to charge on alienation, though a condition cannot restrain a tenant in tail from suffering a recovery, yet such a charge may be imposed by way of alternative: that is, tenant may bar the estate, or not, as he pleases; if he does, it shall be chargeable with £2000.

[ 431 ]

*The Lord KEEPER.*

20th November.

[After stating the case] Upon this will, and state of

the facts, the first question made by the counsel for the plaintiff, was, whether *John Harris*, under this will, took an estate for life, or in tail? The first argument was, that *issue*, technically, is a word of purchase, and words of limitation being added, the devise was to the issue of *John Harris*, after his death, in fee; and it was compared, among other cases, to *Luddington v. Kime*, *Salk.* 224.

1759.  
  
 KING  
 v.  
 BURCHELL.

But the true answer to that is, 1st, That there is no technical word in a will; if the testator's intent be plain, the court will modify and effectuate his expressions. 2dly, That the case has no resemblance to *Luddington v. Kime*, because there the remainder was expressly contingent "to *A.* for life, and in case he have any issue male, to such issue male, and his heirs for ever: and if he die without issue male, then to *B.* and his heirs for ever." There the context necessarily supplies "without (having) issue male."

And to make the word *issue* a word of purchase in that will, the court held, that *issue* was to be taken there as *nomen singulare*, because the inheritance was annexed to the word *issue*. Here it is expressly used in the plural number, "to his issue and their heirs." So that, if he intended the issue to take as purchasers, he intended them to take as joint-tenants; and if *John Harris* had ten sons, and the youngest survived, the nine elder, and their issue, should be disinherited, which is an intent too absurd to be supposed.

[ 432 ]

It is manifest to me, that the testator intended the word *issue* as a word of limitation; because he intended that *John King* should take the estate for want of issue male of *John Harris*, whenever that default of issue happened; and there is not a colour to say, in grammatical, critical, or liberal construction, that there is any period to which that want of issue is restrained. And here is a

1759.  
  
 KING  
 v.  
 BURCHELL.

plain limitation of the whole fee in particular estates and remainders.

But then, it is said, here are words of limitation superadded to the word *issue*, and if *issue* is taken as a word of limitation, the words, “and their heirs,” are nugatory.

It is true, that the best construction of deeds and wills, is to give every word an effect, if it can receive it consistently with other parts of the deed or will. And therefore in the case of *Backhouse v. Wells*, where the devise was “to *B.* for his life *only*, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the body of such issue, and for default of such issue, remainders over,” there was the negative word, *only*, and *issue* was collocated so as to import *nomen singulare*, and the court was at liberty to take it as a limitation to the first and every other son of such issue. But in the case of *Shawe v. Weigh*, where *issue* was used in the plural number, in *Legtute v. Sewell*, where *heirs* was used in the plural number, and, in both cases, words of limitation superadded; the courts were of opinion that the first limitation carried an estate tail; and yet the latter words of limitation were, by that construction, rendered of no effect.

[ 433 ]

And there is not a case in the books where *issue* or *heirs* have been used in the plural number, and words of limitation added, that they have been taken as words of purchase, but, on the contrary, *heir*, in the singular number, has, and *issue* may, from the context, be construed words of limitation (*a*).


But, in the present case, I think the proviso conditional

(*a*) Mr. Justice *Clive*, in word *issue* is one of the most  
*Roe d. Dodson v. Grew*, 2 vexed words in the books;  
*Wils.* 324, observes, “The sometimes it is *nomen singu-*



is a plain declaration of the testator himself, that he had given *John Harris* an estate tail, and that he intended to restrain him from a legal dominion over it. “If the said *John Harris*, or his issue, or any or either of them, shall at any time hereafter alienate, mortgage, incumber, or otherwise commit any act or deed whatsoever, whereby to alter, charge, or defeat the limitations; then, and in such case, &c.” Now, how could *John Harris* charge or incumber the limitations subsequent, if the testator had given him only an estate for life?

*Wright v. Pearson* (a), *Trin.* 1758, determined by me, was, in my opinion, a much stronger case than the present; for there, after a limitation for life, the next limitation was to support contingent remainders; and that, too, was a case of a trust, and I was strongly pressed with the authority of *Bagshaw v. Spencer*. I was, after the best consideration I could give it, and after ransacking all the precedents, of opinion, that it was the limitation of an estate tail. I have revised my notes, and find it was ar-

1759.  
  
 KING  
 v.  
 BURCHELL

[ 434 ]

*lare*, sometimes *plural*, sometimes a word of *limitation*, sometimes of *purchase*; but it must always be construed according to the intent of the will or deed wherein it is used;” and in the same case, Mr. Justice Gould says, “The word *issue* is used in the statute *de donis* promiscuously with the word *heirs*. The term *issue* comprehends the whole generation as well as the word *heirs*, and in my judgment, the word *issue* is more properly, in its natural signification, a word of limit-

*ation*, than of *purchase*.” See also the observations of the court in *Doe v. Applin*, 4 T. R. 88, 89, and the argument of Mr. Justice *Rainsford* there cited; and *Gale v. Bennett*, *Amb.* 681. *Haydor v. Wilshere*, 3 T. R. 372. *Doe v. Collis*, 4 T. R. 294. *Hockley v. Mawbey*, 3 Bro. C. C. 82. 1 *Ves. jun.* 150. *Davenport v. Hanbury*, 3 *Ves.* 257. *Leigh v. Norbury*, 13 *Ves.* 340. *Kirkpatrick v. Kirkpatrick*, *ib.* 481, where this case is much considered.

(a) *Ante*, 119.

1759

~  
KING  
v.

BURCHELL.

gued, and treated in every respect like the present case. There was, as I remember, an appeal to the *House of Lords*, which was deserted, and therefore the acquiescence of the bar in that judgment, is what makes it, after mature consideration, a considerable authority with me, though it was a judgment of my own.

I am therefore of opinion, for the reasons mentioned, and upon the authorities cited, that *John Harris* took under this will an estate tail (a).

The only remaining question is, whether a man can give an estate tail, and, by annexing a proviso conditional not to alien, charge the estate upon alienation of tenant in tail with such sum of money as he thinks proper? And I can no more think of saying any thing upon that question, than, if it were made one, whether, if a person should purchase an estate in fee simple, it would be descendible to heirs female (b)?

Bill dismissed. But, as the testator's will is very inaccurate, without costs.

(a) There have been several cases in which words, which would otherwise have been words of limitation, have been holden to be words of purchase, in consequence of a direction that the heirs or issue, &c. should take as tenants in common, or in some mode incompatible with the regular course of descent. *Doe v. Laming*, 2 Burr. 1100. 1 Bl. Rep. 265. *Doe v. Lyde*, 1 T. R. 597. Mr. Justice Buller's observations, *Doe v. Goff*, 11 East, 668. *Doe v. Jesson*, 5 M. & S. 95: vide also *Wil-*

*son v. Vansittart*, Amb. 562, a case of personal property. The present case must be considered as an exception from the rule established by those cases, on the ground of the general construction of the will, and the particular expressions denoting the intent of the testator that it should be an estate tail.

(b) See Mr. Knowles's celebrated argument in *Taylor v. Hoorde*, Burr. 84. cit. *Fearne*, C. R. 257. *Driver v. Edgar*, Comp. 379. *Goodrill v. Brigham*, 1 B. & P. 192.

Earl of NORTHUMBERLAND v. Earl of EGRE-  
MONT.

(Reg. Lib. A. 1759. fol. 119.)

*CHARLES*, Duke of *Somerset*, in 1683, had married *Eliza*, only daughter and heiress of the Duke of *Northumberland*: and the estates which were settled upon that marriage consisted of three classes. First, The *Wiltshire* and *Somerset* estate, the property of the Duke of *Somerset*; Secondly, An estate situate in the counties of *Durham*, *Cumberland*, *York*, *Sussex*, and the city of *Carlisle*, which was the inheritance of the Duchess; Thirdly, The *Northumberland* estate, which was also the inheritance of the Duchess.

By indenture, bearing date the 4th of *July*, 1715, made upon the marriage of *Algernon*, Earl of *Hertford* (afterwards Duke of *Somerset*, and eldest son of the above marriage), with *Frances Thynne*, reciting, that by indentures, bearing date the 17th and 18th of *January*, 1683, upon the marriage of the said *Charles*, Duke of *Somerset*, several manors, &c. in the counties of *Wilts* and *Somerset*, were settled and assured upon the uses and trusts therein mentioned; and further reciting, that by an indenture, bearing date the 4th of *June*, 1707, made between the said Duke and Duchess of *Somerset*, and the said Earl of *Hertford*, of the first part; and *Thomas Beach* and *John Felton* of the second part; and Lady *Rachael Russell* and Lord *Abingdon* of the third part;

*should be to be paid*, then her portion should cease, and not be paid: there being an only daughter, and the father having died without issue male after her portion was vested, held, that she ought to be considered as an eldest son, and that she was not entitled to the augmented portion, though the estate vested *after* it became payable.

1759.  
20th, 21st, &  
22d February,  
26th November.  
S. C.  
*Perryn*, MSS.

The court will, from the general frame of a settlement, collect the intent contrary to the express words of a particular clause, and therefore, where an estate in *N.*, part of the general estate, was, in default of issue male of that marriage, limited to the first and other daughters, and terms were created of the whole estate, to raise portions for daughters, payable at certain times, and in certain events; and in case there was no issue male of that marriage, such portions were directed to be augmented; with a proviso, that in case any daughter should be entitled to the estate in *N.* before the portion appointed for her

1759.

~~~~~  
 Earl of
 NORTHUM-
 BERLAND
 v.
 Earl of
 EGREMONT.

it was agreed, that the several and respective recoveries wherein the said Earl of *Hertford* came in as vouchee of the lands and hereditaments, &c. in the same recoveries respectively comprised, lying within the several counties of *York*, *Northumberland*, *Cumberland*, *Sussex*, *Somerset* and *Wilts*, and in the city of *Carlisle*, should be and enure to the several uses, &c. thereafter limited, &c. And that in the said indenture was contained a proviso or power for the said Duke and Duchess of *Somerset* jointly, by any deed or deeds under their hands and seals, attested by three or more credible witnesses, with the consent of the said Earl of *Hertford*, and in case of his death without issue male, then with such further consent as is therein mentioned, to revoke, alter, or make void, all or any of the uses, &c. and by the same or any other deeds attested as aforesaid, to limit and appoint any new uses, &c.; it was thereby declared that the said recoveries should enure to the several uses, &c. thereafter limited: (that is to say)—

As to the said premises in the counties of *Wilts* and *Somerset* to trustees for ninety-nine years upon trusts since determined; remainder as to part to the said Earl of *Hertford* for life; remainder as to other part of the premises to trustees to the use of the said *Frances Thynne* for her jointure; remainder, as to the whole, to the said trustees for the term of 600 years upon the trusts thereafter declared; remainder to the said Duke of *Somerset* for life; remainder to the said Duchess of *Somerset* for life; remainder to the said Earl of *Hertford* for life; remainder to his first and other sons in tail male, with remainder in like manner to the Lord *Percy Seymour*, second son of the said Duke and Duchess of *Somerset*, in like manner, with remainder to all other the sons of the said Duke and Duchess of *Somerset*, with remainder to the right heirs of the said Duke of *Somerset*.

As to the said several premises situate in the several counties of *Durham, Cumberland, York, Sussex*, and the city of *Carlisle* (being the antient inheritance of the duchess), to the said Duchess of *Somerset*, for life; remainder to the said Duke of *Somerset* for life; remainder of them and all other the premises the inheritance of the said Duchess of *Somerset*, to the said Earl of *Hertford* for life; remainder to trustees for a term of 600 years; remainder to the first and every other son of the said Earl of *Hertford* in tail male; remainder as to the premises in *Northumberland* and *Cumberland* to the said Duchess of *Somerset* for life, and after her decease, if there was no issue male of the said Earl of *Hertford*, as to the premises in *Northumberland*, to the first and every other daughter of the earl of *Hertford* in tail general; remainder of that and all other the inheritance of the Duchess to Lord *Percy Seymour* for life; remainder to his first and other sons in tail male, with remainders over.

The trusts of the terms of 600 years and 600 years were declared as follows: that in case the said Earl of *Hertford* should happen to die, having one or more younger son or younger sons, and one or more daughter or daughters, or any of them, besides a son that should take by virtue of the limitations therein mentioned, that then the said trustees, and the survivor of them, should from and after the death of the said Earl of *Hertford*, and also after the death of either of them, the said Duke of *Somerset* and the said *Frances Thynne*, out of the rents, issues, and profits of the said premises, or by granting estates or leases thereof, or of any part thereof, &c. raise, levy, and pay unto each such daughter of the said Earl of *Hertford*, the full sum of £10,000 for the marriage portion of each such daughter, to be paid to each such daughter at such times as the said Duke and Duchess of *Somerset* and the said Earl of *Hertford*, during their

1759.

Earl of
NORTHUM-
BERLAND
v.
Earl of
EGREMONT.

1759.

~~~~~  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

joint lives, and as the survivors and survivor of them should appoint; and after the death of the said Earl of *Hertford*, and also of the said Duke of *Somerset* or the said *Frances Thynne*, at their respective ages of seventeen years, or day of marriage first happening, in case they should be then unmarried and under that age, otherwise to be paid on the death of the said Earl of *Hertford* and the said Duke of *Somerset*, or of the said Earl of *Hertford* and the said *Frances Thynne*.

And upon this further trust, that in case it should happen that there should be no issue male of the said Earl of *Hertford* begotten on the body of the said *Frances Thynne*, or if there should be any such issue male, and all such issue male should die without issue male before any such issue male should attain the age of twenty-one years, and the said Earl of *Hertford* should have issue by the said *Frances Thynne* one or more daughters, that then the said trustees, &c. should and might, by and with the consent and direction of the said Earl of *Hertford* during his life, out of the rents, issues, and profits of the term of 600 years so first limited as aforesaid, and after the death of the said Duke and Duchess of *Somerset*, or with the consent of them, or the survivor of them, as also of the said premises comprised in the said other term of 600 years, or by mortgage, &c. raise, levy, and pay unto each such daughter of the said Earl of *Hertford* by the said *Frances Thynne*, the several and respective sums therein mentioned, for the marriage portion and portions of each and every such daughter at such time and times, and in such manner as the said Earl of *Hertford*, during his life, should direct and appoint; and after the death of the said Earl of *Hertford*, at the respective ages of seventeen years, or days of marriage of each such daughter first happening; and in particular that if there should be but one daughter, the sum of £25,000, with a proviso,

that in case the said Earl of *Hertford* should in his lifetime prefer in marriage any of his said daughters, or if any of them should receive a portion provided for a daughter, there being also a son of the said Earl of *Hertford*, then no more of the said sums thereby appointed to be raised for the portion of such daughter so preferred, who should have received a portion as aforesaid, should be raised by virtue of the said indenture than what should make up the sum given with her in marriage, or so received by her as aforesaid, the sum intended by the said indenture to be her portion.

It was also further provided, that if any daughter of the said Earl of *Hertford* should be entitled to the premises in *Northumberland*, comprised in the said settlement, by virtue of the limitations thereof, before the portion appointed for such daughter should be to be paid, then the portion of such daughter should cease, and not be raised.

And in the said indenture of settlement was the clause following, viz. And whereas the manors, &c. in the said counties of *Wilts*, *Somerset*, and *Northumberland*, are comprised in the terms for years created by the said recited settlements, or some of them, upon trust for raising the several sums of money therein mentioned; now to the intent that the present provisions hereby intended to be made for the said Earl of *Hertford*, and the jointure, and the increase thereof hereby intended for the said *Frances Thynne* for her life, and other the provisions hereby made for the issue male or female of the said Earl of *Hertford* and *Frances Thynne*, by and out of the premises in the said counties of *Wilts*, *Somerset*, and *Northumberland*, may not be defeated or prejudiced by the said several terms or trusts thereof declared in the said recited settlements mentioned: it is hereby declared and agreed by and between the said parties to these presents,

1759.

Earl of  
NORTHUM-  
BERLAND  
v.  
Earl of  
EGREMONT.

1759.

~~~~~  
 Earl of
 NORTHUM-
 BERLAND
 v.
 Earl of
 EGREMONT.


that during the continuance of the said provisions for the said Earl of *Hertford* and *Frances Thynne*, and for their issue, male and female, hereinbefore contained, the respective trustees of the said several and respective terms, their several executors, administrators, and assigns shall, by and out of the rents, issues and profits, and by the other ways and means mentioned in the said settlement, raise the monies intended to be thereby raised by and out of all the said manors, &c. comprised in all the said terms, other than out of the said manors, &c. in the said counties of *Wilts*, *Somerset*, and *Northumberland*.

The issue of this marriage was one daughter, Lady *Elizabeth Seymour*, afterwards Countess of *Northumberland*, and one son, *George*, Lord *Beauchamp*.

By the settlement made on the marriage of the plaintiffs, the Earl and Countess of *Northumberland*, dated 16th of *February*, 1740, reciting that Lord *Beauchamp* was then alive, and that the said Countess of *Northumberland* had attained her age of twenty-one, and that she was therefore entitled to the sum of £10,000 only; she assigned the said sum of £10,000 to trustees for the benefit of younger children. The said *Charles*, Duke of *Somerset*, and the said Earl of *Hertford*, thereby covenanted to pay 4 per cent. upon the above sum; and upon the death of the said *Charles*, Duke of *Somerset*, and the said Earl of *Northumberland*, the trustees were empowered to raise the said sum of £10,000.

Lord *Beauchamp* died *July*, 1745, under the age of twenty-one, without issue. *Charles*, Duke of *Somerset*, died 2d *December*, 1748, and was succeeded in his title by his son *Algernon*, Earl of *Hertford*, who died 7th *February*, 1749, without any further issue besides the Countess of *Northumberland*, by which means she became entitled under the settlement to the *Northumberland* estate.

The bill prayed that the sum of £25,000 might be raised by mortgage of the two terms of 600 years in the settlement of the 4th of *July*, 1717; that £10,000, part thereof, might be paid to the Earl of *Egremont*, to the trusts in the plaintiff's, the Countess of *Northumberland's* marriage settlement; and the other £15,000 to the plaintiff, the Earl of *Northumberland*.

1759.

 Earl of
 NORTHUM-
 BERLAND
 v.
 Earl of
 EGREMONT.

The *Attorney-General*, the *Solicitor-General*, Mr. *Sewell*, and Mr. *Cowper*, for the plaintiffs.

This is a question arising upon two terms for 600 years, in the settlement of the late Duke and Duchess of *Somerset*. The court must take into consideration all contingencies expressed, without supplying others that are not specified. The sum of £25,000, the augmented portion, became payable immediately on the Duke's death, in *eodem puncto temporis* with the vesting of the remainder, the event upon which the defeazance was to take place, viz. Lady *Northumberland* becoming entitled to the limitation before the portion became payable; and as this proviso operates as a defeazance of an interest vested, it ought to be taken strictly and literally.

The portions proved by the settlement are of two sorts. First, If there be issue male of the marriage, £10,000 to each of the daughters. Secondly, If Lord *Hertford* die without issue male, the portions are to be augmented. The first portions are rendered payable on the decease of Lord *Hertford* and his lady, or Duke *Charles* and Lord *Hertford*. The increased portions are payable after the deaths of the Duke and Duchess, if Lord *Hertford* consent, with a power to the Duke and Duchess to appoint during their lives. The power was only to accelerate the vesting, not to affect the right. Thus both the days of payment might have happened at two different times before the remainders vested, although by accident they have not.

1759.

Earl of
NORTHUM-
BERLAND
v.
Earl of
EGREMONT.

The portions in this case cannot merge. Lady *Northumberland* is tenant in tail of the premises in the 600 years' term, and the term comprises other premises besides those to which she is so entitled. *Duke of Chandos v. Talbot*, 2 P. Wms. 601. *Rushout v. Rushout* (a), Dom. Proc. 1725. In *Powell v. Morgan*, 2 Vern. 90, the court went so far as to say that the daughter's portion did not merge, though the descent was in fee. *Guillam v. Holland* (b), 10th July, 1741, was another case of a charge not merged. Lord *Hardwicke* there observed, that it was a case of a daughter's portion; and said that equity would not aid a merger, but on the contrary would rather interpose to prevent one.

These portions would vest for some purposes before Lord *Hertford* died; but, at all events, they could not vest till a daughter attained the age of seventeen: therefore, if Lord *Hertford* had died without issue male when the daughter was under seventeen, she would have been entitled to the estate, and not to the portion. If, on the other hand, Lady *Hertford* had died leaving a daughter, that daughter, at the age of seventeen, would have been entitled to the augmented portion, and not to the estate, because Lord *Hertford* might have had issue male by another marriage. It was therefore defeazable during his life, but, subject to such defeazance, was vested. *Pitfield's case*, 2 P. W. 513. *King v. Withers*, For. 117. A husband acting and treating on these, would settle in consideration of this augmentation, seeing that it would be impossible for the estate to come before the additional portion. Since courts have refused to raise portions upon future terms, they have been more liberal as to the time of their vesting.

(a) 16 Vin. Ab. 449.

short note of another point

(b) This case is not reported at length; there is a

which arose in it, 2 Atk. 343.

Mr. *Perrott*, Mr. *Harvey*, Mr. *Wilbraham*, and Mr. *Hoskins*, for the defendants.

This is a common settlement, by which, in certain events, the different estates were to go in different channels. First, it provided for a son: Secondly, for younger children: Thirdly, for daughters if there was a son: Fourthly, for daughters in case there was no son. If Lady *Hertford* had died, and Lord *Hertford* had had a son by a second wife, that contingency was provided for in the third case. If, as in the fourth case, he had no son, the daughter was to have the *Northumberland* estate; and is in effect, as far as that is concerned, made a son. It is in many respects a very inaccurate settlement; but not only upon the general spirit, but upon the particular construction of it, Lady *Northumberland* cannot be entitled both to the estate and the portion raisable out of part of it.

The portions did not vest at seventeen or day of marriage, as contended for. The expression *to be paid*, means actual payment: they waited the death of Lord *Hertford*, unless he chose to accelerate their vesting by appointment. They were only marriage portions, and no more vested than is always required for marriage portions. Lady *Hertford* stipulates, “If I have no issue male, but have daughters, those daughters shall have the *Northumberland* estate. If I have a son, but that son dies before twenty-one, and without issue male, my daughters shall have augmented portions: but it was never imagined that a daughter should have both the *Northumberland* estate, and an augmented portion of £25,000, part of which was to be raised out of that very estate. All that was meant was, that a daughter should have £25,000, or the *Northumberland* estate, not both: “If your portion is to be paid you before you come to the *Northumberland* estate, it shall not be drawn back again.” And that

1759.

Earl of
NORTHUM-
BERLAND
v.
Earl of
EGREMONT.

1759.
 ~~~~~  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

is the rule and principle which this court goes upon. *Chadwick v. Doleman*, 2 Vern. 328. Lord *Teynham v. Webb* (a). The event which has happened is within the very words of the proviso. Lady *Hertford* survives Lord *Hertford*, and it was possible that she might have been *enceinte*. In that case the estate would have vested in the daughter, subject to being divested on the birth of a son; but the portion could not so have vested. *Gordon v. Raynes*, 3 P. W. 134. The Earl of *Northumberland* could never have had this £15,000 in view. It could never have been expected that the daughter, who was to have half the *Percy* estate, should have a contribution as against the remainder of the *Percy* estate, and against the person who was to support the honour and dignity of the family. *Wingrave v. Palgrave*, 1 P. W. 401.

The *Attorney-General* in reply.

The whole of the case depends upon the proviso for sinking the portions; it will then be seen that the clauses bear a uniform construction. The words are, "The portion of such daughter shall not be raised"; now this necessarily presupposes the portion vested. To say that the portion waited a birth, *en ventre sa mere*, and that the vesting of the estate did not, is in direct opposition to the authority of *Reeve v. Long*, 3 Lev. 408. They say it was not intended that Lady *Northumberland* should have both the portion and the estate. But how can they maintain that, when it appears that if the day of payment came before the estate, the daughter should have both? If the defendant's construction is right, then whenever the portion and the estate vested together, no portion should accrue. But if the portion and the estate coming together was to defeat the portion, why did they not say so? The truth is, the subject was not great enough to require minute consideration.

(a) 2 Ves. 198.

*The Lord KEEPER.*

This bill is brought by the Earl and Countess of *Northumberland*, she being the only daughter of *Algernon*, Duke of *Somerset*, against *Charles*, Earl of *Egremont*, *John*, Earl *Granville*, *John Manners*, commonly called Marquis of *Granby*, and Lady *Frances* his wife, and Lord and Lady *Aylesford*, defendants. And it is to have £25,000 raised by mortgage of two terms of 600 years each, in the settlement of the 4th *July*, 1715, that £10,000, part thereof, may be paid to the Earl of *Egremont*, to the trusts in the plaintiff's marriage settlement, and the other £15,000 to the Earl of *Northumberland*. The only question is, whether the event has happened, by which the Countess of *Northumberland* was to be entitled to £25,000 for her portion, according to the intent and meaning of the trust in this marriage settlement.

This settlement of the 4th of *July*, 1715, was made by *Charles*, Duke of *Somerset*, and his duchess, together with their eldest son *Algernon*, Earl of *Hertford*; and it is made by remodelling two former settlements therein recited, and adapting the same to the exigencies of the family. (Here his Lordship stated the settlement at length.)

This settlement, which was probably conducted under the advice of the most eminent council in *England*, as it concerned so grand, so proud, so formal a family, is on all sides confessed to be extremely inaccurate in its expressions. This may be accounted for by the draught, which was prepared by inferior men, having afterwards become so voluminous, that the principal supervisors put their hands rather than their heads to it.

The fact was, that Duke *Algernon* had issue male, the Lord *Beauchamp*: he survived the marriage of Lady *Northumberland*, but died before twenty-one, and without issue.

1759.

Earl of  
NORTHUM-  
BERLAND

v.  
Earl of  
EGREMONT.

26th November.

1759.

Earl of  
NORTHUM-  
BERLAND

v.  
Earl of  
EGREMONT.

• Upon this it was argued by the plaintiff's counsel, that the event had happened upon which the augmented portions attached, and consequently that the trustees ought to be directed to raise them. The defendants repel this claim by the proviso, "That if any daughter of the Earl of *Hertford* shall be entitled to the premises in *Northumberland*, by virtue of the limitations before the portion appointed for such daughter shall be to be paid, then the portion of such daughter shall cease, and not be raised." The plaintiffs say, that by the death of the Earl of *Hertford* without issue male, the limitation of the premises to Lady *Northumberland* attached, and the portion was to be paid at the same time: and therefore that the event of the defeazance never existed, which was Lady *Northumberland's* becoming entitled to the limitation before the portion was to be paid. And they add, that the proviso ought to be taken strictly and literally, as it is to operate by way of defeazance of an interest attached or vested in Lady *Northumberland*.

But *qui hæret in litterâ hæret in cortice*, especially in the case of trusts, which are to be ruled and governed according to the intent of the parties, where such intent is consistent with the rules of law: and the court will, from the general frame of a testament or settlement, collect the intent, contrary to the express words of a particular clause. One might cite innumerable cases to this effect, but a stronger cannot be cited than the case of *Coryton v. Helyar*, 1745, where a term was devised to a son and his heirs for 99 years, by which a term in gross was vested in the son; and yet the court, from the general frame, collected the testator's intent, and defeated the interest vested by the particular clause (a).

(a) This remarkable case on several occasions: in *Strong v. Teat*, Burr. 923, Chap-

Why, then, the question is brought to this, whether the parties to this settlement intended that Lady *Northumberland* should have this £25,000 raised in the event which happened?

It is observable that this question arises from this circumstance, that the premises in the term of 600 years, are more extensive than those in the limitation to Lady *Northumberland*, and the end of this application is, to have that rateable proportion that would be coming out of the estate now vested in Lord *Egremont*, Lady *Granby*, and Lady *Aylesford*.

The general end and intent of this settlement seems to me to have been this. My Lord *Hertford* was the principal agent in it; since he had, by the former settlements, an estate tail in the whole *Percy* estate. In order to accommodate his marriage in his father's life, he agrees to remodel the settlement, and to make himself tenant for life, with remainder to his first and other sons in the whole; but if he had no issue male, he intended to make his daughter an eldest son with respect to the *Northumberland* estate; and, if more daughters, to augment their portions as against their brother and the collateral limitations.

If Lord *Hertford* had died without issue male, living his wife, Lady *Northumberland* would have been entitled to that estate; yet there could have been no doubt but that, in such case, she would have been excluded

*man v. Brown*, *ib.* 1631, and 466, by Lord *Eldon*, who alluded to a report of that case, in *Jones v. Morgan*, *Fearne's* C. R. App. 590, by Lord *Mansfield*: in *Venables v. Morris*, 7 T. R. 437, by Lord *Kenyon*: in *Wykham v. Wykham*, 18 Ves. 421, and *Wilkinson v. Adam*, 1 V. & B.

1759.  
  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

1759.

~  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

from her portion, though she might have been only entitled to a dry remainder. Yet, in that case, her younger sisters would have been entitled to their augmented portions; for, by the proviso, the defeazance is not co-extensive with the augmented portions, but is restrained only to that daughter who becomes entitled. Now it seems to me odd to suppose that the parties to that settlement should have said, Lady *Northumberland* shall be excluded from the augmentation by a dry remainder vesting in her before she became entitled to her fortune, but not by the possession vesting *uno eodemque tempore* with the portion.

If Lady *Hertford* had died without leaving issue male by Lord *Hertford*, and had left issue female, the daughter or daughters would have been entitled to the augmented portions, though Lord *Hertford* should have had issue male by another wife, payable at the time Lord *Hertford* should have appointed during his life, to be raised out of the first 600 years' term, and after the decease of the duke and duchess, or with their, or the survivor's consent, out of the second 600 years' term, or at the age of seventeen, or marriage, after the earl's death.

From hence it appears, 1st. That the daughters could not be to be paid their augmented portions during the life of Lord and Lady *Hertford*. 2dly. That if Lord *Hertford* survived his lady, and there was no issue male of their bodies, the daughters could not be paid without his consent in his lifetime. 3dly. That with his consent, Lady *Hertford* being dead without issue male, or having had issue male, and such issue had been dead before twenty-one, without leaving issue male, they might in his lifetime have been paid out of the first term, and with the consent of the duke and duchess out of both. 4thly. That if such consent had been obtained, and the portions



directed to be raised, though Lord *Hertford* had died without general issue male, the portion of the eldest or only daughter could not have been recalled.

The ground and reason of this provision seems to have been, that the contingent remainder, on failure of general issue male, would not have been of a nature certain enough to have advanced any daughter in marriage, during the father's life. But to suppose that the parties intended that the daughter should have had the *Northumberland* estate limited to her in tail, and a rateable proportion of £25,000 out of the other estates comprised in the two terms, is the most whimsical supposition that can possibly be made. It seems to me to be very plain from the frame of this settlement, that it was the intent of the parties, that from the time daughters would become entitled to their augmented portions, and while the contingent remainder was in suspense, they were to be considered as younger children; but as soon as the remainder to the eldest daughter vested, she was considered as an eldest son, her augmented portion is annihilated, but the proviso leaves those of her sisters to remain as younger children still. And I think that the proviso referring to the raising clause, should be taken as if it were inserted in it and a part of it; thus, "Then the trustees shall raise, levy, and pay unto each daughter the several and respective sums following, as and for their marriage portions; *i. e.* If but one such, the sum of £25,000; provided she shall not be entitled to the premises in *Northumberland* by virtue of the limitations in these presents before her portion shall be to be paid." And as the direction to raise supposes a time for the raising, she would be entitled to the estate before the money was literally to be paid.

However, I do not like to ground a determination of right and property merely on a sense put upon ungram-

1759.

Earl of  
NORTHUM-  
BERLAND  
v.  
Earl of  
EGREMONT.

1759.

~  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

matical and barbarous expressions; for, as they will bear a colour in any mode of explanation, so they will give satisfaction in none.

I shall therefore form my opinion upon a larger bottom, the general intent of the trust collected from the frame of this, and the nature of similar settlements; in which, I think, I am warranted by the general rules of the court, and similar authorities. And I think the cases which have been determined with great satisfaction, though with as great liberality, with respect to money left or appointed to younger children, where the vesting has been suspended, nay, in truth, divested, to answer the intent of the will or appointment, bear great resemblance to, and are much stronger in their principles than the present case.


Such was the case of *Lord Teynham v. Webb (a)*. A term of years was created to raise and pay after the decease of *Lady Strangford* and *Mrs. Audley*, £6000 to such persons as *Lady Strangford* should, by deed or will, appoint, and for want of such appointment, to her executors and administrators. *Lady Strangford* appointed £5500, part thereof, should be paid unto and amongst all and every the child and children of *Henry, Lord Teynham*, on the body of *Catharine* his wife, except their eldest son, in such shares and proportions as *Lord Teynham* should appoint, and in default thereof, share and share alike; and if *Lord Teynham* had but one child, besides an eldest son, to such child. At the time of this deed *Lord Teynham* had but two children, *Philip*, and the defendant *Elisa*; but some time after, his second son was born. In 1723 *Lord Teynham* died, without making any appointment, and leaving those three children. *Philip*, the eldest son, died 1727, upon whose death the plaintiff became eldest son, and the defendant

(a) 2 Ves. 198.

*Eliza*, in 1729, intermarried with Mr. *Webb*, who, in consideration of the marriage, and of the said £5500, made her a proper settlement. Lady *Strangford* died in 1730; Mrs. *Audley* in 1731; upon whose death the portion became payable. The plaintiff now brought his bill for a moiety, for that he being with the sister the only younger children, it became a vested interest in him on the father's death, in the same manner as if the father had appointed it. She insisted that it did not vest till the death of Lady *Strangford*, when the term commenced, or the death of Mrs. *Audley*, when the portion was payable, at which times the plaintiff was an eldest son. According to the note which I have concerning this determination, the court was of opinion that the cases of portions stood on *a particular bottom*; they were not similar to legacies, nor to the general question of portions charged on land, where the dispute is with the landholder, whether the sum shall be raised or not. (The then case was that of a chattel.) But the court said that, in case of portions, nothing was more common than to see them vest and divest upon the birth of a fresh child, and that they must not only *be*, but *continue to be*, younger children till the time of payment.

And Lord Keeper *Wright*, in the case of *Chadwick v. Doleman*, held, that the appointment was defeasible, not from a power of revoking, or upon the words of the appointment, but from the capacity of the person.

Now, upon these cases I make these observations; 1st. That in the case of Lord *Teynham v. Webb*, the court could not deny the vesting on the death of the father, so as to have been transmissible; for, said the court, it would have been very inconvenient to say there was no vesting till the death of Mrs. *Audley*, for then a younger child might have married, left children, and nothing would

1759.  
  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

1759.

~  
 Earl of  
 NORTHUM-  
 BERLAND  
 v.  
 Earl of  
 EGREMONT.

[ \*452 ]

have been transmitted. 2dly. That the court got the better of legal rules and subtleties with respect to vesting in the case of a trust, in order to effectuate the intent of \*the creator of that trust; that the same person should not enjoy the family estate and the portion.

Now, upon the present settlement, it appears to me, that the intent of the parties was, that the augmented portions should go to the daughters in the capacity of younger children, and therefore, that if Lord *Hertford* had any general issue male that attained to the dominion of the *Northumberland* estate, she, the eldest daughter, was to be such. But if there was no general issue male, she was to be in the capacity of an eldest son, and the sisters still to be entitled to the augmented portions.

This case seems to me to be much stronger than that of Lord *Teynham v. Webb*, because that was a contest about a chattel, at all events to be raised out of the inheritance. But here the contest, as far as there is substantially any, is between the portion and the inheritance in Lord *Egremont* and Lord *Granby*. And in such a case it is the fixed and settled rule of this court not to raise the portion out of the inheritance till it is wanted for the daughter's advancement; and I see no more reason for saying that the rateable proportion out of the defendant's estate was any more wanted for her intended portion than it was in the case of *Brewin v. Brewin (a)*, where no time was appointed for the payment, and a bill was brought for raising it when the daughter was five years old.

I am therefore of opinion that, according to the intent of the settlement, in the event that has happened, Lady *Northumberland* is not entitled to have the £15,000,

(a) Prec. Can. 195.

part of the £25,000 raised, and therefore that the bill must be dismissed without costs (a).

(a) See the doctrine contained in the cases of *Chadwick v. Doleman*, and Lord *Teynham v. Webb*, discussed by Lord *Manners* in *Savage v. Carrol*, 1 *Ba. & Be.* 265. *W. 244. Jermyn v. Fellowes, For. 93. Broadmead v. Wood, 1 Bro. C. C. 77. Doran v. Ross, 3 Bro. C. C. 22. 1 Ves. jun. 57. Leake v. Leake, 10 Ves. 477.*  
*Vide also Beale v. Beale, 1 P.*

1759.  
 ~~~~~  
 Earl of
 NORTHUM-
 BERLAND
 v.
 Earl of
 EGREMONT.

[453]

LAWRENCE v. MAGGS.

(Reg. Lib. Min. Trin. 1759.)

1759.
 3d July.
 S. C.
 cit. 1 *Bro. C. C.* 198.

JAMES MAGGS being possessed of a lease for ninety-nine years, determinable on three lives, which he held under the corporation of *Bath*, on the marriage of his son *Thomas Maggs*, by indenture, dated *July, 1746*, assigned the same to trustees, to permit the said *Thomas Maggs* to enjoy the rents and profits for his life; remainder to *Jane*, his intended wife, for life, and after their decease in trust, and for the use of such child and children in such manner, and by such shares and proportions as they should jointly by writing appoint; for want thereof to the use of all and every the child and children of the said *Thomas Maggs*, on the body of the said *Jane* to be begotten, equally between them, share and share alike, and in default of such issue, to the said *James Maggs*, his executors, administrators, and assigns, for the residue of the said term.

Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life, with remainders to the children, the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal.

Limitation of a leasehold estate in a marriage settlement after the decease of husband and wife, in trust for such child and children as they

Thomas Maggs renewed twice, upon the dropping of

should appoint; and in default of appointment, to all and every the child and children equally: held, to be a vested remainder, which opened to take in the issue, as they came in *esse*.

1759.

 LAWRENCE
 v.
 MAGGS.

two of the lives; the first time putting in his own life, the second time that of his wife. He had also expended a considerable sum in rebuilding the house. He died, having had five children, three of whom died in his lifetime.

This bill was brought by certain creditors of *Thomas Maggs*, for an account of his personal estate, and satisfaction out of his assets.

The *Attorney-General*, the *Solicitor-General*, Mr. *Sewell*, and Mr. *Wilbraham*, for the plaintiffs.

[454]

Two questions arise upon this bill; first, whether the estate of the deceased is to receive any allowance in respect of the fines, and charges of renewal (*a*); and, secondly, whether the shares of the three children, who died in the lifetime of the father, are to be considered as part of his assets.

First, the creditors come here clothed with the merits, and have all the rights of the debtors. It is a universal rule, that, where tenant for life renews, he is a creditor *pro tanto* on the specific lease. The personal estate is exhausted, and hence the creditor's equity.

As to the second point, which relates to the three shares of the infants who died. Their interest was transmissible, and consequently will belong to the father, for they had vested interests at the time of their birth, or at least such interests as were transmissible, though contingent in their amount. The children are to take generally, at all events, whether the power be executed or not: in different proportions, perhaps, but they must take. Such powers are prudential, and inserted *ex cautela*, sometimes not intended, and often not wished to be executed. *Cholmon-*

(*a*) There was another which does not appear to have question made as to the ex- been much noticed. penses of the rebuilding, &c.,

deley v. Meyrick (a), *Maddison v. Andrews* (b), Lord *Teynham v. Webb* (c), and *Walpole v. Conway* (d).

Mr. *de Grey*, Mr. *Comyn*, and Mr. *Perrot*, for the defendants, contended that the fines having been paid by a father, must make them be considered as a gift, particularly as no benefit was done to the remainder-man by the lives put in.

As to the other question, it is one which has been much agitated, and there are great difficulties on both sides. It is, no doubt, an inconvenience, that where a child dies in the lifetime of the father, leaving issue, there should be no provision for it. But it seems a still greater evil, that the death of an infant, a year old, should transmit the portion to the father. The mode least liable to objection is suspending the time of vesting for a certain time, in order to give the parent a control over the conduct of the children. Another strong ground for proving that these portions cannot vest, is the uncertainty of the objects who are to take. Uncertainty was the ground of the decisions in *Maddison v. Andrews*, and *Earl of Godolphin v. Duke of Marlborough* (e).

The Lord KEEPER.

This bill was brought for an account of the assets of *Thomas Maggs*, and to have a satisfaction out of them for the plaintiff's demands: and principally with a view to have the opinion of the court, whether the fines and charges of the renewals, and the rebuilding the house was to be considered as a debt payable from the estate, or those claiming in remainder under the settlement, to the representative of *Thomas Maggs*, to increase his assets:

(a) *Ante*, p. 77.

(b) 1 *Ves.* 57.

(c) 2 *Ves.* 198.

(d) *Barn. Ch. Rep.* 153.

(e) 2 *Ves.* 61.

1759.

LAWRENCE
v.
MAGGS.

[455]

1759.

LAWRENCE

v.

MAGGS.

and to have the estate sold subject to the widow's life, and the money divided into five parts, and three thereof carried to the account of the father's assets, three of the children having died in his lifetime.

Thomas Maggs renewed twice; first when he put in his own life, which was of no benefit to those in the settlement, who were to take in remainder after his death. He renews a second time, and puts in his wife's life; and this he does voluntarily, and without there being any directions for him in the settlement to renew the lease.


The renewing the lease with any other life, than that of the tenant for life, is for the benefit of the remainder man, and he is to be deemed a creditor keeping down the interest during his enjoyment. In all these cases the father is acting as a stranger, bettering the duration of the estate for the common benefit of the particular estates, and not as a father advancing his children. It must therefore be referred to the Master, to ascertain what sum was expended for the second renewal, &c. (a)

456]

(a) Where the tenant for life is one of the persons upon whose life the lease is held, there is no reason that he should be at any expense in adding another life, because the lease is as durable as his interest. *Verney v. Verney*, Amb. 88. Any money therefore which he may have paid for a renewal will be a charge on the estate. *Adderley v. Clavering*, 2 Bro. C. C. 659. 2 Cor, 192. But as in renewing for his own use, he would be making an uncon-

scientious benefit of the estate, *Stone v. Theed*, 2 Bro. C. C. 243, in every case of a lease in trust, whatever alterations are made, it is still subject to the old trust. *Pierson v. Shore*, 1 Atk. 480. *Holt v. Holt*, 1 Ch. Ca. 191. *Edwards v. Lewis*, 3 Atk. 538, and in all cases where a lease is settled upon a person for life, with remainders over, and he obtains a renewal of the lease, the renewed lease will be bound by the trusts of the will or settlement. *Taster*

The remaining question is upon the three shares of the infant children dying in the lifetime of the father, whose

1759,

 LAWRENCE
 v.
 MAGGS.

[457]

v. *Marriott*, *Amb.* 668. *Ran*
 v. *Chichester*, *ib.* 715. *Owen*
 v. *Williams*, *ib.* 734. *Picker-*
ing v. *Vowles*, 1 *Bro. C. C.*
 197. *Killick* v. *Flexney*, 4
Bro. C. C. 161. *James* v.
Dean, 11 *Ves.* 383, 15 *Ves.*
 236. *Randall* v. *Russell*, 3
Meriv. 190. *Fitzgibbon* v.
Scanlan, 1 *Dom. P. C.* 261.
Winslow v. *Tighe*, 2 *Ba. &*
Be. 196, and the court pro-
 ceeded upon the same prin-
 ciple where a lease of pre-
 mises, in which a partnership
 trade was carried on, had been
 renewed by one partner clan-
 destinely. *Featherstonehaugh*
 v. *Fenwick*, 17 *Ves.* 298.

As to the proportion in
 which, in cases of leases for
 years, or for lives where the
 tenant for life is not *cestuy*
que vie, the expenses of re-
 newal are to be paid, the old
 rule of distribution, which
 threw one third on the ten-
 ant for life, is (as it has
 been in mortgages) exploded.
Nightingale v. *Lawson*, 1 *Bro.*
C. C. 440, corrected 1 *Cox*,
 181. *Stone* v. *Theed*, *sup.*
Coppin v. *Fernyhough*, 2 *Bro.*
C. C. 291. *White* v. *White*, 4

Ves. 24. In the latter case
 (and in *Buckridge* v. *Ingram*,
 2 *Ves. jun.* 652.) Lord *Alvan-*
ley is reported to have con-
 sidered, that the tenant for
 life ought to pay nothing but
 the interest. Lord *Eldon*,
 however, when that case came
 on upon appeal, 9 *Ves.* 554,
 disapproved of the doctrine,
 on the ground of the possible
 inequality: his Lordship con-
 sidered that the cases had de-
 cided, that it was better to
 determine the proportion upon
 fact than speculation; there-
 fore if the tenant for life is
 bound to pay in any degree,
 he ought to pay in proportion
 to the benefit he *de facto* took
 under the effect of the trans-
 action; and the remainder
 man ought also to pay, with
 reference to his proportion of
 the benefit; viz. "that inter-
 est in the renewed term,
 which was *ultra* so much of
 the renewed term as expired
 in the life of the person who
 renewed the term." The same
 course was adopted in *Allan*
 v. *Backhouse*, 2 *Ves. & Be.*
 65.

1759.

LAWRENCE

v.

MAGGS.

shares are claimed as belonging to his estate: and there the consideration is only, whether their shares, under the settlement, were vested and transmissible. And I am of opinion they were. But I do not think the determination in *Cholmondeley v. Meyrick* is in point with the present; for there Mrs. *Meyrick* had married, and the portion was wanted to be raised. Had she died an infant unmarried, it could not have been raised against the heir, but as far as it was aided by the clause of survivorship, and could not have been transmitted.

But here is no question between the portion and inheritance: this is only a limitation in trust of a chattel where the remainder vests, and opens to take in issue as they come *in esse*.

It was said by Mr. *Wilbraham*, that the consequence of this opinion carries the provision of a child of the tenderest years to the father, which is true: but I think that is an inconvenience not equal to that of suspending it to the father's death, by which the issue of any children marrying and dying in the father's lifetime, would be unprovided for and excluded. And, indeed, I know no case where the court hath made the provision ambulatory to the father's death; but where the payment is to be made to persons being at the time under particular descriptions, as in the case of *Lord Teynham v. Webb*; but in the common cases, where the court hath interposed, *largá manu*, in favour of the heir at law (a).

Decree an account of the personal estate of testator, *Thomas Maggs*, &c.: estate be sold, subject to the life estate of the defendant *Jane*: the money be divided into five parts, three of which are to be paid to defendant,

(a) See *Cholmondeley v. Meyrick* v. Earl *Verney*, *post*. Vol. *Meyrick*, *ante*, 77. *Rooke* v. II. 26. *Rooke*, *post*. Vol. II. 8. *Ver-*

Jane Maggs, executor of *Thomas*, to be applied in a course of administration.

1759.

LAWRENCE
v.
MAGGS.

SCOTT v. SCOTT.

(Reg. Lib. Min. Mic. 1759.)

1759.

25th June, and
26th November.

S. C.

Amb. 383.

Aston MSS.

[* 459]

HENRY SCOTT, by articles made previous to his marriage, bearing date the 2d of *August*, 1733, covenanted to settle lands in the *West Riding of Yorkshire*, of the yearly value of £100, upon himself for life ; remainder upon his wife for life ; remainder upon his sons in tail male.

By his will, bearing date the 20th of *December*, 1746, reciting that he had not made any settlement in pursuance of the said articles, he devised certain premises in *the *West Riding of Yorkshire*, called the *Rothmels* estate, to the plaintiff *Alice Scott*, his wife, for life ; remainder to his sons successively in tail male ; remainder to his daughters as tenants in common : and in regard that the said tenements so devised were not of the yearly value of £100, he thereby directed his executors to purchase in the *West Riding*, sufficient to make the said devised land of the yearly value of £100 ; and that in the mean time, they should make up the said *Rothmels* estate of the yearly value of £100.

After giving several specific legacies to his wife, the sum of £1000 to his second son, *William*, and the sums of £1200 to each of his four daughters, he devised all other his real estates, not thereinbefore devised, to his eldest son, the defendant *Henry Scott*, his heirs and assigns ; but in case he should die without issue before twenty-one, to his second son, *William*, in tail ; remain-

A. having covenanted to settle lands of 100*l.* per ann. on his wife for life, devises to her an estate of the annual value of 50*l.* and directs his executors to purchase sufficient land to make up the annual value of it 100*l.*, and then devises all his real estates, not thereinbefore devised to *A.* his eldest son, his heirs and assigns ; but in case he should die without issue before 21, over : held, that *A.* took by devise, and therefore, that the simple contract creditors, but not the legatees, were entitled to resort to the real estate for so much of the personal estate as should be exhausted in making up the estate devised to the wife.

1759.
 ~~~~~  
 SCOTT  
 v.  
 SCOTT.

der to his daughters and their heirs, as tenants in common; but if they should die without issue before twenty-one, remainder to the testator's brothers, and their heirs, as tenants in common.

The yearly value of the *Rothmels* estate being only £50, this was a bill brought by *Alice Scott*, the widow of the testator, against *Henry Scott*, and also against the younger children, and the executors, praying an account of the personal estate, and a specific performance of the marriage articles, and that the rights of the children might be settled.

The *Solicitor-General* and Mr. *Altham* for the plaintiff: Mr. *Sewell* for the younger children.


[ 460 ]

The younger children will be prejudiced in their legacies if the *Rothmels* estate is to be made good out of the testator's personalty; they therefore have a right to stand in the place of specialty creditors against the heir. They are by common right entitled to come on the real estate. The eldest son is not a specific devisee, but takes by descent. It is not a devise of lands by name, but of the general residuum of the real estate; the words are *all my real estate, not hereinbefore devised*. The limitation over is not a condition, and does not alter it: it is a devise in fee to the heir. *Hopkins v. Hopkins*, For. 44. *Pells v. Brown*, Cro. Jac. 590. *Hinde v. Lyon*, Roll. Ab. 626. Dy. 124, b. 3 Leon. 64. *Hamley v. Fisher*, 7 Nov. 1751. If in the present case the heir be charged for the legatees, it will be in pursuance of the testator's intent. It is nothing more than the common equity against an heir, which is not repelled by stating him as a devisee. The estate is neither new modified, nor new settled.

The *Attorney-General*, and Mr. *Reynolds*, for the defendant *Henry Scott*.

This is a case where the legatees contend that they

have a right to come by circuitry on the real estate, for which, had the estate descended, they would have had an equity. The testator knew that he might have charged whichever estate he thought proper. He knew his assets were liable to make good this covenant, and he therefore directs in what manner it should be made good; that is, by his executors purchasing new land, and he directs them to make the estate up £100 *per annum* in the mean time. If a particular estate be devised to a stranger, with remainder to the heir at law, the heir takes by descent: so also, if a fee descends in the mean time, and upon a future event goes to the right heirs of the devisor, the heir takes by descent. *Mo.* 608. *Hob.* 30. 1 *Ro.* Ab. 626. And the reason is, because the same estate is given to the heir, as he would have taken by descent. But here the devise, though a devise of a fee, is subject to, and fettered with an executory devise. The heir has, therefore, not the same estate as would have descended to him. In this case the legatees could not have come for this circuitry against the remainder-man. *Herne v. Meyrick*, 1 *P. W.* 201. *Clifton v. Burt*, *ib.* 678. The heir is a favourite of this court, which will marshal assets in order to exonerate the real estate.

1759.  
  
 SCOTT  
 v.  
 SCOTT.

[ 461 ]

*The Lord KEEPER.*

(a) This is a new case, and one of great nicety. The current of the cases shews, that where the heir is intended to take by devise, but in fact takes by descent, the legatees in such case shall have resort to the real estate; but that it is otherwise where the heir takes as a specific

(a) The Editor has been favoured with this report of the judgment from a note of the case among the MSS. of Mr. Justice *Aston*, in the library of the late Lord C. B. *Thompson*.

1759.  
 ~~~~~  
 SCOTT
 v.
 SCOTT.

devisee. This rule, indeed, if carried to its fullest extent, might be extremely inconvenient, and reduce an eldest son to beggary. I take the substantial difference to be, that where the estate given is different in its quality from the estate which would have descended, there the heir shall take by devise: a charge does not alter the descent. But supposing an estate is given to daughters as joint tenants, the descent is broken. In the present case, I think the children being unprovided for are to be considered as creditors. I shall however take time to consider before I deliver judgment.

The Lord KEEPER.


Nov. 26.

[462]

There are two sorts of executory devises, one where the testator devises his estate to his heir, and to go over on a contingency, which is to take place within a reasonable time; the other where he devises it over on a future contingency, and being silent as to what shall happen to it in the mean time, thereby permits it to descend to his heir. As to the present case, I am clear that it is a specific devise of the real estate to *Henry*, for that he took a different estate from what he would have had by descent.

Refer it to the Master, to see whether the *Rothmels* estate was a proper purchase, as far as it extends in satisfaction of the articles: an account of the personal estate, and that if he shall be of opinion that it is a proper purchase, let a sufficient part be applied to the purchase *pro tanto*, if it is not sufficient: and in case the personal estate is not sufficient to pay the testator's other debts, and make good the articles likewise, then any of the simple contract creditors are to be at liberty to resort to the real estate so devised to the eldest son, for so much as shall be

exhausted by the plaintiff out of the personal estate, for making good the said articles. (*Reg. Lib. Min.*)

1759.

 SCOTT
 v.
 SCOTT.

It is a positive rule of law, that wherever a devise gives to the heir the same estate in *quality* as he would have by descent, he shall take by the latter. *Vin. Ab. Heir, W. 1, 2.* & Mr. *Hargrave's* note, *Co. Lit. 12. b.* where all the authorities are collected, for it is a principle that a man cannot give to another what he has already. *Dy. 12. Counden v. Clerke, Hob. 29. Godolphin v. Abingdon, 2 Atk. 57.*

This rule has been said to have been adopted in favour of the *heir*, that he might be in of his better title, and thereby toll an entry, or have a warranty. *Per Charlton, J., Hedger v. Rome, post.* but if this were the case he would have it in his power to elect, which he cannot, but must of necessity take as the law directs. *Styl. 149.* The true reason was observed by Sir *F. Norton*, in *Hurst v. the Earl of Winchelsea*, (cit. note to the last edition of *Plowden*, 545. *a.*) to be in favour of third persons, viz. of the lord,

for the preservation of the tenure (a valuable thing before the statute of *Marlbridge*), and of *creditors*, for the preservation of their debts; which was admitted by Lord *Mansfield*. See 2 *Pow. on Dev. 21, 22. & Styl. 148. cit. ib.*

To make the heir take by devise, as observed by Lord *Eldon* in *Bailey v. Ekins*, 7 *Ves. 323*, there must be "an alteration of the limitation of the estate, from that which the law would make by descent;" as a devise of an estate tail to the heir; of land in fee to two daughters being testator's heirs; of gavelkind lands to several sons; of all testator's land to one of two daughters, &c. *Anon. Cro. Eliz. 431. Beare's case, 1 Leon. 112. Co. Lit. 163, b. &c.*; or a devise to trustees directing them to convey to the persons described, as purchasers. *Swaine v. Burton*, 15 *Ves. 365.* But a mere alteration as to the *time of the heir's coming to the estate* does not create such a difference in

[463]

1759.

SCOTT

v.

SCOTT.

[* 464]

point of estate as to prevent him from taking by descent.

Preston v. Holmes, Styles, 148. *Nottingham v. Jennings*, 1 *P. W.* 23. *Clarke v. Smith*, *sup.* *Hedger v. Rome*, 3 *Lev.* 127. *Allam v. Heber*, *inf.* which have overruled *Gilpin's* case, *Cro. Car.* 161. & *Brittam v. Charnock*, 2 *Mod.* 286. 1 *Freem.* 248. 2 *Pow.* on Dev. 29, 30.

It is clear also that according to the distinction taken by Lord *Holt*, in *Emerson v. Inchbird*, 1 Lord *Raym.* 728, a charge by will does not make the heir, to whom the land is devised so charged, a purchaser. *Clarke v. Smith*, *Com. Rep.* 72. 1 *Lutw.* 797, 1 *Salk.* 241. *Allam v. Heber*, *Stra.* 1270, *Bl. Rep.* 22. *Freemoult v. Dedire*, 1 *P. W.* 429. *Plunkett v. Penson*, 2 *Atk.* 290. *Chaplin v. Leroux*, 5 *M. & S.* 14. Mr. *Fearne* has discussed this subject with great ability in two opinions, which have been published in his *Posthumous Works*, p. 128. & p. 229. In the latter he has satisfactorily shewn, that where lands are subjected to a charge by will, with a devise to the heir in fee, *restraining possession till pay-*


ment of the charge, the heir will nevertheless take by descent.

Upon the question contained in the principal case, whether, where the fee being * devised to the heir, subject to an executory devise, he takes by descent or purchase, great doubts have been entertained. "The better opinion," as observed by Mr. *Preston* in reference to the present case, "is, that he takes under the will, as the quality of the estate is altered; as he takes a fee with a qualification, instead of a fee absolutely." 3 *Prest.* on Conv. 261. The case of *Hinde v. Lyon*, *Dy.* 124. 2 *Leon.* 11. 3 *Leon.* 70. which was much relied upon in the argument, is totally different from the present. It was a mere devise to *A.* till the testator's heir should attain twenty-four, and then to the heir in fee, &c. It is clear that there was here no alteration made in the estate. The heir took nothing but what he would have done if his name had not been mentioned after the devise to *A.*, and the estate had been permitted to descend.

In *Goodright v. Searle*, 2 *Wils.* 29. (in which case another very important question arose on the subject of merger), the words of the devise were exactly the same as those in the present case, and though it does not appear to have been cited in the argument, yet the opinion of the court is a decided confirmation of the doctrine which it contains. Mr. Justice *Bathurst*, upon the first argument, inclined to think that the heir took by his better title. The rest of the court, however, considered that the testator, by the manner in which he had carved out his estate, had broken the descent. Judgment was never given in consequence of a compromise, but the reporter adds, that he understood the court were afterwards, upon a second argument, unanimously of that opinion: and though

the question as to the heir's taking by descent or purchase, has not since come under judicial consideration, yet the case has been repeatedly recognized as an authority for the opinion reported to have been entertained upon the point of merger. *Fearne, Ex. Dev.* 561. *Doe v. Hutton*, 3 *B. & P.* 656. *Goodtitle v. White*, 2 *N. R.* 383. & 15 *East*, 174.

Since the first edition of these cases the decision in *Doe v. Timins*, 1 *B. & A.* 530, has occurred, in which, on a devise to an heir in fee with an executory devise over in case he does not attain twenty-one, it was holden that he took by descent; which may be considered as overruling the present case. The report also contains Serj. *Hill's* MS. observations on it, which are very important.

1759.

SCOTT
v.
SCOTT.

1759.
27th Nov. and
4th and 5th Dec.
S. C.
Amb. 383.

Earl of SALISBURY v. LAMBE.

(*Reg. Lib.* A. 1759. fol. 171.)

Sums of money appointed by deed and will to *A.* for life, and then for her daughters and younger sons, payable in such shares, &c. as she should appoint, &c. and in default, in trust for all her daughters and younger sons in equal shares, to be paid at their respective ages of twenty-one years; and in case any of them die, before his or her portion became payable, to the survivors: held, that the portions vested in the children at twenty-one, during the lifetime of *A.*

THE Earl of *Thanet*, by indenture, dated the 25th of *November*, 1725, assigned £2000 in trust for the sole and separate use of his daughter, the Countess of *Salisbury*, and afterwards in trust for her daughters and younger sons, in such shares, &c. as she should by deed or will appoint; in default of appointment, in trust for her daughters and younger sons in equal proportions, to be paid at twenty-one or marriage; in case any of them should die, or become heir male of the Countess of *Salisbury* before his, her, or their share became payable, such share to go to the survivor; if all should die before their shares became payable, to the Countess, her executors and administrators.

By his will, dated the 21st of *July*, 1721, he appointed a further sum of £2000, part of £10,000, over which he had a power of appointment, in the same manner as above.

By a codicil to his will, dated the 23d of *September*, 1728, he gave £30,000 to his executors in trust for his five daughters, *Mary*, Countess of *Harold*, *Catherine*, Lady *Sondes*, *Anne*, Countess of *Salisbury*, *Margaret*, Countess of *Leicester*, and Lady *Isabella Delaval*, equally among them, and their respective children. If any of his five daughters should die, the £6000 so given should be in trust for her daughters and younger sons, in such shares, &c. as his said daughter should by deed or will appoint; in default of appointment, to be divided equally among them, and to the survivors and survivor of them.

And in case there should be no such daughter or younger son, or all should die before twenty-one or marriage, then in trust that his daughter so dying should dispose of the said £6000, and the interest thereof, to such of her sisters and her younger children, and in such proportions as she should judge they would have most occasion for the same; and in default of appointment, in trust for all and every the daughters and younger sons of her sisters that should be living at her death, to be equally divided among them.

The Countess of *Salisbury* had four younger children, *William Cecil*, who died, leaving the plaintiff, his brother, his executor, *Lady Anne Strode*, the Countess of *Egmont*, and *Lady Margaret Cecil*.

By her will, dated the 22d of *November*, 1742, taking notice that she had no younger son living, and only the said three daughters, she appointed the above sums in the following proportions: to *Lady Anne Strode* £4000, Countess of *Egmont* £2000, *Lady Margaret Cecil*, who had attained the age of twenty-one, £4000.


She survived all her daughters, dying the 22d of *March*, 1757. This bill was brought to have the trusts performed, and to settle the rights of the several parties.

The plaintiff claimed as representative of *Mr. Cecil*, and *Mr. Strode* of *Lady Anne*. Lord *Egmont*, as the representative of his Countess, who was the survivor of *Lady Salisbury*'s younger children, *Lady Gower*, *Lady Southwell*, and *Lady Isabella Pawlett*, as younger children of the Earl of *Thanet* who survived *Lady Salisbury*.

The *Attorney-General* and *Mr. Sewell* for the plaintiff.

The *Solicitor-General* and *Mr. Cove* for Lord *Egmont*.

All the children having died in the lifetime of *Lady Salisbury*, the appointment is clearly void, under the au-

1759.

 Earl of
 SALISBURY
 v.
 LAMBE.

1759.

Earl of
SALISBURY
v.
LAMBE.

thority of *Oke v. Heath* (a), and the Duke of *Marlborough v. Godolphin* (b). This, therefore, lets in the clause of survivorship in the codicil of Lord *Thanet*, by which Lady *Egmont*, if alive, would have been entitled to the whole of the £6000.

Mr. *Cove*, for the next of kin of Lord *Thanet*, cited Lord *Bindon v. Earl of Suffolk*, 1 P. W. 96. *Bird v. Lockey*, 2 Vern. 744, and 2 Vent. 347.

Mr. *Jones* for the defendant *Strode*.

The Lord KEEPER.

This bill, which is very complicated, is confused with different claims on different estates; viz. the personal estate of Lord *Thanet* and that of Lady *Salisbury*. But the principal end of the plaintiff's bill is to have the decision of the court upon three gifts made by Lord *Thanet* to Lady *Salisbury* and her children.

The first was a gift by deed of the 24th of *November*, 1725, which was an assignment to *John Coke* of £2000 for the use of Lady *Salisbury* for life, and then for her daughters and younger sons, payable in such shares and proportions, and such times, as the Countess should appoint by deed or last will; and in default of such direction and appointment, then in trust for all and every the daughters and younger sons of the said Countess in equal shares and proportions, to be paid at their respective ages of twenty-one years or marriage; and in case any of them happen to die, or become heir male of the body of the said Countess, before his or her portion become payable, then to go to the survivor: if all happen to die before the shares became payable, to the Countess of *Salisbury*.

It is agreed by the counsel on all sides that Lady *Salisbury* made no appointment, or, which is the same

(a) 1 Ves. 135.

(b) 2 Ves. 77.


thing, her appointment was void. It is likewise agreed that all the younger sons and daughters of Lady *Salisbury* attained twenty-one in their lifetime: and the principal question is, whether the shares vested in Lady *Salisbury*'s children so as to be transmissible. And I am of opinion that the interests became transmissible on their attaining twenty-one or marriage; and that if they did not, neither Lord *Egmont* as survivor, nor Lady *Salisbury*'s personal estate, could have been entitled to them; but that they must have been part of the personal estate of Lord *Thanet*.

As to the £2000 under the will of Lord *Thanet*, I am of the same opinion, and that it was transmissible to the representatives of Lady *Salisbury*'s children.

With respect to the £6000, I am also of opinion that it vested so as to become transmissible on their attaining twenty-one or marriage; and that there was no survivorship by way of limitation after that time. This question has been settled over and over again, and entirely to my satisfaction. As to the words "survivors and survivor of them", they can only mean to give cross remainders to the children before the devise over can take place. With respect to the sister's children, they have no colour of right, as it must have fallen into Lord *Thanet*'s *residuum* before it came to them (a).

Decree accordingly.

(a) *Vide Cholmondeley v. Meyrick, ante, 77.*

1759.

 Earl of
 SALISBURY
 v.
 LAMBE.

1759.
5th & 8th Dec.

PIGOTT v. J'ANSON.

(Reg. Lib. B. 1759. fol. 186.)

Testator having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be *enceinte* with, by an instrument executed in the *East Indies* during his last illness, empowers *A.* and *B.* to invest any gold-dust, &c. which he had in bottomry, &c. as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk: held, that this instrument, though it had been proved in the ecclesiastical court, was merely an act *inter vivos*, and not a revocation of the will.


Courts of law and equity supervise the acts of the spiritual court, when they are incidental to their own determinations; and therefore if they prove an act *inter vivos*, they will consider it as void, and *coram non judice*, as much as if that court had proved a will relative to lands only.

JOHN SOMERS, who was a supercargo on board an *East India* ship, being about to sail from *England* on a voyage, executed a will, bearing date the 14th of *December*, 1719, whereby he bequeathed all his personal estate to his wife *Sarah Somers*, to have and enjoy the use and interest thereof for her life; and if she should happen to be *enceinte* of a child or children by him begotten, then from and after her decease, unto such his child, if but one, or if more, to such his children, equally to be divided between them, share and share alike; and to his, her, or their use and benefit for ever.

Being afterwards, in the course of the voyage, very dangerously ill, he signed a paper, bearing date the 23d of *December*, 1720, which was the day before his death, in which, after taking notice that he was chief supercargo on board the *Bridgewater*, then in the Straights of *Malacca*, he empowered the captain, *Williamson*, and *Massey*, the chief mate, to dispose or let out on bottomry any money which should be produced by the sale of his effects at *Madras*; and he directed that Mr. *Mobbitt*, of *Fort St. George*, should invest any gold which he had on board in diamonds for his said wife; but if that could not be done, that *Williamson* and *Massey* should dispose of it on bottomry as they should think most advantageous, and deliver the same to his wife or her assigns: she, his

said wife, running all risks that might accrue by letting out any of the said money on bottomry. He then gave some pecuniary legacies, but did not appoint any executor.


Mrs. *Somers* had no children by the testator: she obtained letters of administration with the two papers annexed, and got the whole of her husband's personal estate. She afterwards married Mr. *Pigott*, whom she survived. By her will and codicil, dated respectively 27th *March*, and 6th *September*, 1757, she disposed of the whole of her real and personal estate, appointing the defendant *J'Anson* executor. The next of kin of the testator *Somers* contended that the use and interest for her life only was given by the testator, with remainder to her children; that there was no bequest over, but that his personal property was to be delivered for no other use than that in the will.

1759.

Pigott
v.
J'Anson.

The Lord KEEPER.

This bill is brought to have an account of the personal estate of Mrs. *Pigott*, and to be paid thereout certain legacies given to the plaintiffs. The executor states, by his answer, that Mrs. *Pigott* was the widow of *Somers*, who made his will, and gave her his personal estate *prout* his first testamentary schedule; and that he made a second, by virtue of which she conceived herself entitled to all Mr. *Somers's* personal estate: but that the defendants, the next of kin of *Somers*, insist he only gave her the use of his personal estate for life, and that on his death it became distributable to his next of kin, according to the statute. And if their claim is founded in law, he has not assets to pay the legacies.

To prove that the personal estate of *Somers* was absolutely given to his wife, the probate of two papers are read with administration granted, with the informal will annexed, to her as principal legatee. By the first it ap-

1759.

 PIGOTT
 v.
 J'ANSON.

pears that *Somers* gave the use of his personal estate to his wife, with a contingent disposition of the whole to any child or children she was *enceinte* with; and she having none, he died, as to that will, intestate, as to the personal estate, after his wife's death. A year after making that will, being very ill in the *East Indies*, he makes a writing, empowering Captain *Williamson* and Mr. *Massey* to return on bottomry any part of his goods or money that shall be produced by sale of his effects; Mr. *Mobbitt* to convert the gold he had on board into diamonds; if that could not be done, to be converted by Captain *Williamson* and Mr. *Massey* as they think most advantageous to his wife, and to be delivered to her, or her assigns; she running all hazards that may accrue by letting out any of the said money on bottomry. Then there are in the same instrument particular sums of money given to his friends.

It has been said at the bar, that this is a revocation of his former will against his expected child, and an absolute bequest of his effects in the *East Indies* to his wife. But I consider this as a common authority given to his agents at Fort *St. George* to collect, convert, and consign his effects to his wife, who, under his former will, was to have the use of his personal estate for life; and the laying the risque on the estate was necessary to induce his agents to act, who would never have entered into the *respondentia* bonds, if they had not been indemnified out of it.

But it was said, and it is proper to give it an answer, that the ecclesiastical court has proved this instrument as a testamentary schedule, and that I must take it to be such. Now I know of no such rule. If an instrument comes before me which appears not to be an act *inter vivos*, in order to found a decree upon it as a testamentary act, it must be proved in the spiritual court. But if they prove there what is an act *inter vivos*, this court will con-


sider the probate as void, and *coram non judice*, as much as if they had proved a will relative to lands only. And this court and every court of law supervises the acts of the spiritual court, where they are incidental to their determinations (a).

I must therefore declare, that Mrs. *Pigott* was only entitled as legatee of the personal estate for life, and that the residue was distributable according to the statute of distribution.

(a) But in general, any memorandum, or scrap of paper, written by a deceased person in contemplation of death, will be considered testamentary, and if admitted in the ecclesiastical court, will be supported in equity. *Lawson v. Lawson*, 1 P. W. 440. *Hall v. Hemer*, Amb. 203. *Coxe v. Basset*, 3 Ves. 160. *Thorold v. Thorold*, 1 Phillim, 1. In *Downing v. Townsend*, Amb. 280, Lord *Hardwicke* considered himself bound by the sentence of the prerogative court. And in *Chaworth v. Beech*, 4 Ves. 565, where the deceased had

indorsed a promissory note, Lord *Rosslyn*, in an action that was brought, held the indorsement to be testamentary, and Lord *Alvanley* was afterwards of opinion, that if the testator had died without giving it by his will, it might have been proved as testamentary.

See also the cases cited in the arguments in the *Duchess of Kingston's* case, 20 How. St. Tr. 355, and Mr. *Hargrave's* argument on the effect of sentences of courts ecclesiastical. *Law Tracts*, 449.

1759.

PIGOTT
 v.
J'ANSON.

1759.
14th December.
S. C.
Amb. 385.

The University of OXFORD v. CLIFTON.

(*Reg. Lib. A.* 1759. *fol.* 65.)

Devise of premises to *A.* and the issue of his body living at his death and for want of such issue, over; is an estate tail in *A.*

CHARLES VINER, esquire, by his will, bearing date the 29th of *December*, 1755, devised certain premises called *Meanham Meadow*, to the defendant *Dr. Clifton*, and the issue of his body, lawfully begotten, living at his death, and for want of such issue to the University of *Oxford*. This was a bill to have the title deeds secured.

The *Solicitor-General* and *Mr. Wilbraham* for the plaintiffs.

The defendant is entitled only to an estate for life, with a contingent remainder to his issue, if he should have any at his death, for the life or lives of such issue. The word issue in this case is a special *designatio personæ*, and as such under the authority of *Burchett v. Durdant*, 2 *Vent.* 311. *Wedgward's* case, cited by Lord *Hale*, in *King v. Melling*, 1 *Vent.* 231, and *Long v. Beaumont*, 1 *P. W.* 229, the defendant cannot take an estate tail. Every word in a will ought to have a sense put upon it if possible. If it be construed an estate tail, the words, "living at his death," which are capable of construction, must be left out. The subsequent words, "for want of such issue," cannot enlarge his estate into an estate tail, for it means such issue as was living at his death. *Lovelace v. Lovelace*, *Cro. Elix.* 40, was a devise to one, and his eldest issue male, he having no son at the time, it was adjudged an estate for life only. The word eldest was held a clear *designatio personæ*. The intent of the testator is very clearly against the defendant's taking an estate tail. To what purpose would he have

given remainders over if he knew they might be immediately barred? The period when the children's estate is to begin, is the death of the defendant; if there are several, they must take a joint tenancy for life: there is nothing absurd in this, but at all events the court cannot alter the declared intention of the testator.

1759.
The University
of OXFORD
v.
CLIFTON.

The Lord KEEPER.

(Without hearing the counsel for the defendant.) This is the plainest case I ever saw in my life. The issue cannot take by present devise as joint tenants with the defendant. They are not to take by remainder, but by descent. All the posterity are intended to take; it cannot therefore be a contingent remainder, but is clearly an estate tail. I must therefore dismiss the bill (a).

(a) As to the word *Issue*, vide *King v. Burchell*, ante, p. 433, and the note to it.

Earl of PETERBOROUGH v. MORDAUNT.

1760.
19th, 20th, and
21st Feb.

(*Reg. Lib. A. 1759, fol. 192.*)

CHARLES, Earl of *Peterborough*, by indentures of lease and release, bearing date the 28th of *February* and 1st of *March*, 1734, conveyed all his real estates to certain trustees for himself for life; remainder to the said trustees upon trust, to settle £200 *per annum* on *A.* created a trust for the payment of incumbrances out of the rents and profits of his real estate, part of which being subject to the arrears of a rent charge to the crown, was discharged by a privy seal, provided £5000 be paid to *B.* and *C.*, for securing which a term was created by act of Parliament; held, that this was a debt affecting the estate, and not within the trusts of the deed, and therefore that the tenants for life must keep down the interest.

1760.

~
 Earl of
 PETERBORO-
 ROUGH
 v.
 MORDAUNT.

his grandson, *John Mordaunt*, for life, an annuity of £500 *per annum* on his eldest son, the plaintiff, then *John*, Lord *Mordaunt*, for life, to raise competent sums for the maintenance and education of the plaintiff's sons, and then upon further trust out of the surplus to discharge the real incumbrances on the said estates, until such eldest son of the plaintiff should attain the age of twenty-five, and then that they should settle and convey the said estates to such son, and the heirs male of his body, with divers remainders over, and the reversion to himself in fee: with a power to revoke and declare new uses.

By indentures of lease and release, bearing date the 4th and 5th of *September*, 1735, on the marriage of his said grandson, *John Mordaunt*, with the Countess Dowager of *Pembroke*, he revoked the uses of the above settlement as to the estate of *Parson's Green*, conveyed the same to the Countess of *Pembroke* for life for her jointure, with remainder to himself in fee.

By his will, dated the 9th of *September*, 1735, he declared that the yearly rent of £500, provided for the plaintiff, should be in lieu of all claims on the testator's real and personal estate, and that if he should contest the said settlement or will, that the said annuity should cease, and directed that the incumbrances should be paid out of the rents and profits of the real estate.

A privy seal, dated the 20th of *November*, 1755, was directed to the Lords Commissioners of the *Treasury*, which after reciting a grant by letters patent, bearing date the 20th of *January*, 1690, of the manor of *Dauntsey*, in the county of *Wilts*, to the said *Charles*, Earl of *Peterborough*, and the heirs male of his body, with a reservation of a yearly rent charge of £300; and the said rent charge had never been paid up to the present time, and that an arrear of £17,100 was then due and owing

upon it, which, if levied, would ruin the family, and that the two daughters of the said Earl of *Peterborough* therein mentioned, were unprovided for; proceeded in the following words: "We order you to acquit and discharge the said arrears, provided, before such discharge, the sum of £5000 be paid, or secured to be paid, to the said Lady *Frances* and Lady *Mary Mordaunt*, as of our free gift and royal bounty, it being our express direction, that until the said £5000 be paid to them, or secured for them, this our royal benevolence to the said family shall not take place or be effectual for the discharge of the said arrears."

1760.
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 Earl of  
 PETERBO-  
 ROUGH  
 v.  
 MORDAUNT.

By an act of parliament, 29 Geo. 2, reciting the above letters patent and privy seal, it was enacted that the said manor should be vested in trustees therein named, for the term of five hundred years, to raise the said sum of £5000.

Three claims were set up by the bill. 1st, To the rents and profits of the late Earl's estates, after all incumbrances discharged, as heir at law, the trust not being disposed of till the plaintiff's son should attain the age of twenty-five. 2dly, To the estate at *Parson's Green*, the Earl having revoked the settlement of 1734; and 3dly, under the act of parliament, the plaintiff contending, that he ought only to keep down the interest of the charge of £5000. The two first claims were ceded by the counsel for the defendants; as to the charge of £5000, the defendants insisted by their answer that it was an incumbrance to be discharged by the rents and profits under the will of the Earl of *Peterborough*.

The *Attorney-General* and Mr. *Wilbraham* for the plaintiff.

The act of parliament could never have intended that this sum should be raised out of the rents and profits. It

1760.

~  
 Earl of  
 PETERBOROUGH  
 v.  
 MORDAUNT.

[ \*477 ]

was a new charge created upon the estate, and as such to be paid like every other charge, where the personal estate is exempted by sale or mortgage.

\*The *Solicitor-General* and Mr. *de Grey*, Mr. *Perrot* and Mr. *Hoskins*, Mr. *Sewell* and Mr. *Jones*, for the different defendants.

The only question now remaining is, whether the £5000 is an incumbrance within the trust. It certainly was so before the privy seal and the act of parliament. The sole intent of Lord *Peterborough* was evidently to clear the estate, and to redeem the family. Consider then how the privy seal affects it. The suggestion to the crown is, that the family will be ruined by payment of the arrears, and prays that it may be discharged on payment or security to the ladies of £5000. Was not this part of the old debt to the crown, or how can it be distinguished from it? An agreement conditionally to extinguish the arrears, a sum being first paid or secured. It is admitted that the ladies will be prior on the whole estate to the annuitants. They might have had a *levari facias* in the *Exchequer* to raise this £5000. They might have come into this court against the trustees, for a discovery and account of the rents and profits of the *Dauntsey* estate, and for the payment of the £5000 out of them. As to the act of parliament, compare this to the case of a mortgage. If the Earl of *Peterborough* had made a mortgage, it would have been within the provision of his own deed of trust: the act can do no more.

*The Lord KEEPER.*

Suppose tenant in fee, subject to a mortgage of £3000, devises to *A.* for life, remainder to *B.* in fee, and directs the rents and profits to be applied to discharge the said £3000; they both join in a new mortgage for an addi-

tional sum of £3000 for the benefit of *B.*; could *B.* come into this court to have the old trust of the rents and profits applied?

*\*For the defendants.*

We submit he could.

*The Lord KEEPER.*

I cannot think so. It is a new mortgage, and must be borne according to the course of the court.

*The Lord KEEPER.*

Upon the pleadings in this case three questions were made, but two of them have been waived by the defendants' counsel upon a clear recognition of the rules of law and equity: the third arises upon the following case.

Lord *Peterborough*, by indenture dated the 1st of *March*, 1734, made a trust of his estate for payment of certain annuities, and the residue of the rents and profits, till a grandson was twenty-five, in payment of the real incumbrances on the said estates. The manor of *Dauntsey*, one of the estates, was subject to a rent-charge of £300 *per annum*, and an arrear of £17,100. The privy seal is a writ to the officers of the revenue to discharge this arrear, provided the £5000 be paid or secured to be paid to the ladies.

Now it is plain that the £5000 was to be considered as no part of the £17,100, for the whole of that is to be released on a security made, and as no person by the privy seal is directed to pay this money, it is plain that they designed to effectuate it by an act of parliament.

The act therefore charges a new sum on the estate, and secures it by a new created term, which must follow the general rule of the court, and while it continues on the

1760.


Earl of  
PETERBOROUGH

v.  
MORDAUNT.

[ \*478 ]

Feb. 21.

*mill* for ninety-nine years, determinable on the lives of himself and his two sons, both estates being nearly of equal value, and having a wife, and two sons and two daughters, by his will, dated the 2d of *July*, 1743, gave an annuity of £20 to his wife, payable out of both the estates. He then gives £600 to each of his daughters, £300 to his eldest son, *John*, and directs, that in consideration of the expense he had been at in his education, he should relinquish the interest he had in the leasehold estate to his brother *Giles*; and after giving several legacies, all the residue of his real and personal estate, whatsoever and wheresoever, he gave and bequeathed to his executors in trust for his said younger son *Giles*, till he should attain twenty-one, and then directed that the said trust should cease.

1760.  
  
 PEAT  
 v.  
 POWELL.


*Giles* attained twenty-one before the death of the testator, which happened on the 3d of *May*, 1746. Upon his death *John* claimed the freehold estate as heir at law to the testator, told his brother that he had taken the opinion of counsel, and that in consequence of it he was determined to file a bill against him, unless he would release the *Forcoate* estate to him: in consequence of which *Giles*, at the recommendation of his mother, by indenture, dated the 13th of *August*, 1747, released and conveyed his right to the freehold estate to his brother *John*, who covenanted to pay half the annuity to his mother.

[ 480 ]

At the time of executing the release *Giles* was indebted upon bond, dated *June*, 1747, to *Robert Gillet* for £500, and to other persons in other sums, and on the 23d of *December*, 1756, became a bankrupt. This was a bill by the assignees to have the estate reconveyed, and deeds and writings delivered up.

The *Attorney-General*, Mr. *Sewell*, and Mr. *Jones*, for the plaintiffs.



1760.  
  
 PEAT  
 v.  
 POWELL.

[ 481 ]

The case depends almost entirely upon the construction of the will, and is but little aided by the depositions. We must therefore have recourse to that fundamental rule of construction, the intent of the testator. We find this throughout very strong in favour of *Giles*, and great stress is laid upon the situation of the eldest son, who was, in the opinion of the testator, already advanced. That being clear, there is also as little doubt but that the words he has used are of sufficient force to carry a fee, *Tanner v. Wise*, 3 P. W. 294; and therefore having given the whole estate in fee to the trustees, it is hardly to be believed, that he intends any thing to result to the heir at law. The case of *Newland v. Shephard*, 2 P. W. 194, is very like this. There Mr. *Shephard* devised the residue of his real and personal estate to trustees to apply the rents and profits for the maintenance and benefit of such of his grandchildren as should be living at his decease until his said grandchildren should come to the age of twenty-one or be married. And the court were most clearly of opinion, that the grandchildren should have the benefit of the trust after.

The release is void under the statute of *Elix.*, *Giles* was never perfectly apprised of his rights; and though *John* told him he had counsel's opinion, yet it was never shewn him, nor is it insisted on by the answer. *Broderick v. Broderick*, 1 P. W. 239. *Pusey v. Desbouverie*, 3 P. W. 316.

The *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Holkins*, for the defendant *John Powell*.

That the words residue, &c. will carry a fee, and that they do so here to the trustees, there is no doubt, for wherever an estate is given out, of which greater estates than the express estates given may arise, the trust shall be a fee. *Shawe v. Weigh*, 8 Mod. 382. But that fee

evertheless be subject to a resulting trust. It is necessary that the legal estate and the trust should be co-extensive, and the question is, whether the court will find it necessary to construe the words "till twenty-one," a gift of the beneficial estate in fee: whether they are sufficiently strong to form that necessary implication, upon which alone an heir can be disinherited. Sir *Thomas Raymond*, 453. *Vaughan*, 259. If *Giles* was intended to have the absolute beneficial interest in both estates, as well as in the residuum, why was not the leasehold also given in trust till he was twenty-one? This is another exclusion of that necessary implication. The demands come with a very bad aspect after an acquiescence of ten years.

1760.  
PEAT  
v.  
POWELL.

*The Lord KEEPER.*

Upon the first question, I am quite clear that *Giles* was intended by the testator to have the whole beneficial interest in the residue, and that the trust was meant only to continue during the minority. It is the same as if the testator had said, "I give the residue of my estate to trustees in trust for *Giles*, till he attain twenty-one, and then to *Giles* and his heirs." The case of *Newland v. Shephard* is much stronger than the present (a).

[ 482 ]

As to the second question. This is not like the case where conveyances are made to quiet family differences, in which case the court will not require strict equality of consideration. Here was no equivalent whatever given by *John*: he did not so much as release his right to the *Frogmill* estate. There was indeed no fraud, but it

(a) In *Fonnereau v. Fonnereau*, 3 Atk. 316, Lord Hardwicke is reported to have disapproved of that case. See Mr. Cox's note, 2 P. W. 194, and the cases cited by him: vide also *Atkinson v. Paice*, 1 Bro. C. C. 90.

1760.

PRAT

v.

POWELL.

being a voluntary conveyance is void against the creditors of *Giles* (a).

(a) *Vide Partridge v. Gopp, Wycherley, post. Vol. II. 175. ante, 163, and Wycherley v.*

[ \*483 ]

THE ATTORNEY-GENERAL v. BRADLEY.

1760.

10th, 11th &  
13th June.

(Reg. Lib. A. 1759. fol. 516.)

Where *A.* by will executed before the statute of mortmain, directs *B.* to settle a freehold estate to pay a sum not exceeding £100 *per ann.* in such manner and upon such trust, on such a part of the poorer people of a parish as he should think and find to be a most proper charity; and *B.* in pursuance thereof, by will executed after the statute, appoints a sum less than the £100 *per ann.*: held, 1st, That the appointment is not void by the statute; and, 2dly, That the amount to be appointed was discretionary in *B.*, and not to be increased under the 43 *Eliz.* to the whole amount given by the will of *A.*

MRS. *Anne Sedgewick*, by will, bearing date the 3d of *August*, 1728, reciting that she was entitled in reversion, to her sole and separate use, to a good estate in the parish of *Penn*, gave to her dear husband, *Raphael Sedgewick*, doctor of physic, all those estates for his life; and then ordered in these words: “ And I do hereby order \*that he settle the whole freehold estate in the parish of *Penn*, to pay a sum not exceeding £100 *per ann.* after his death, and the death of my sister-in-law, in such manner, and upon such trusts, on such a part of the poorer people of the parish of *Penn*, as he shall think and find to be a most proper charity; and this shall be so ordered to commence after my sister-in-law’s death and his, or before his death, if he should think convenient; and the remaining part or overplus of such my freehold estate, in present and reversion, after that charity is so paid, I give and bequeath, after my husband’s death, to my trusty and well-beloved friend *Thomas*, the son of *William Bradley* of *Barn-street*, and the male issue of his body, a constant and ever living trustee of and to that charity; he or his heirs, or the heirs of him that shall enjoy it, not being in

a capacity to part with it by sale or otherwise, but that they may see the charity paid or settled."

The information then set forth, that Dr. *Sedgewick*, upon the death of his wife, caused to be engraven upon her gravestone, in the parish church of *Penn*, the following inscription: "*Anne Sedgewick* lies interred under this place, after she had made an appointment of her brother's whole estate, leaving £100 *per ann.* to the use of the poor of the parish of *Penn*, to be disposed of as her husband, Dr. *Sedgewick*, should think most proper, fearing not the instruments of Satan hindering him from settling so charitable a design."

Dr. *Sedgewick* by his will, bearing date the 14th of *October*, 1747, after reciting the aforesaid will or appointment of his said late wife, in pursuance of the power and discretionary authority so by her said will vested in him concerning the premises, and for settling the said estate in trust for the uses in and by the said will directed, did order and direct, that within four years next after his decease, out of the rents and profits so bequeathed to him, and which, on his decease, would descend to the said *Thomas Bradley*, a sum of money be raised, sufficient for erecting five good and commodious tenements or dwelling-houses on some part of the lands so descending to him in the parish of *Penn*, or any other part of the said parish of *Penn*, which the several trustees to be appointed to see the trusts thereby directed, performed, and fulfilled, should think proper; and did thereby further order and direct, that at the end of four years after his decease, the several trustees to be appointed, or the major part of them, should nominate and appoint five such poor persons, parishioners of the said parish of *Penn*, as to them should appear proper objects of the said charity, to dwell in and occupy the said five houses, as to them the said

1750.  
The  
ATTORNEY-  
GENERAL  
v.  
BRADLEY.

1760.

The  
 ATTORNEY-  
 GENERAL  
 v.  
 BRADLEY.

trustees, or the major part of them, should seem good; and that they should, out of the rents and profits of the said estate, pay to each person so inhabiting the said houses the sum of £5 each, every year; and that the said trustees should, at the expiration of four years next after his decease, for ever thereafter raise out of the rents and profits of the said estate, the yearly sum of £10 to the master for the time being of the charity school at *Penn*; and the testator directed, that with all convenient speed after his decease, the said *Thomas Bradley*, by such proper conveyances in the law as by the said trustees hereinafter named should be devised, should grant and convey the said estate to the said several persons in trust, to see the several tenements built and erected, and to pay the said several sums, and to act and do all such matters and things relating to the said charity, as should be esteemed proper and necessary for establishing the same. He then named certain persons to be appointed trustees, and directed that in the said grant or conveyance to be made by the said *Thomas Bradley*, should be inserted a clause to empower the trustees, out of the rents and profits, to raise any sums of money that should be deemed reasonable and necessary, for keeping in repair the said five tenements.


[ 485 ]

By indenture of lease and release, bearing date the 23d and 24th of *August*, 1753, the legal estate was conveyed to trustees to the uses and trusts of Dr. *Sedgewick*'s will.

The information prayed that the sum of £100 annually might be charged out of the estate, according to the will of the testatrix, with arrears from the death of Dr. *Sedgewick*, and directions for the management of the charity.

The *Attorney-General* and Mr. *Wilbraham* for the relators.

As to Dr. *Sedgewick's* will, if that is to operate by itself, and not by relation to the will of his wife, there is no doubt but that the appointment is void, as being made after the statute of mortmain ; but he is only executing a power which arises, and is to have effect out of the old dominion. *Co. Litt.* 112 a. Had he died intestate, there can be no doubt but that something must have been raised for the charity ; for she appoints perpetual trustees, and considers the charge as subsisting for ever : therefore whatever does so come to the charity can only come from the will of Mrs. *Sedgewick* : there is no objection whatever to that will. It was very soon after the statute decided by Lord *Hardwicke*, that a will made before the statute should take effect, when the testator died after ; that surrenders of copyhold should be supplied ; and, in short, that such wills should have every privilege that wills had before the statute. The great question in dispute here is, whether the sum of £100, or what other sum, is to be raised for the charity ; and on this point we submit that the words of the will are clearly directory. As far as the amount of the sum is in question, there is no discretion left in the donee of the power. The words “ not exceeding ” are merely put in out of favour to the residue. She intended to purchase a visitatorial power over the charity, and that was the amount of the sum to which she confined herself ; and the inscription raised by Dr. *Sedgewick* shews that such was the construction which he put upon it. The court will use a more liberal construction in favour of a meritorious object like a charity ; and where there is in such cases a choice left between two different degrees of bounty, it will, if it sees fit, direct the exercise of the larger. In *Kingsman v. Kingsman*, 2 *Vern.* 559, an heir was disinherited, and the estate given to a remote relation, with a desire that he might receive £20 per quarter, or £40 if the devisee

1760.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BRADLEY.

[ 486 ]

1780.  
 ~~~~~  
 The
 ATTORNEY-
 GENERAL
 v.
 BRADLEY.

thought he deserved it. The court directed that he might receive the £40.

Mr. *Sewell* and Mr. *Perrott* for the defendant.

As to the question under the statute, we do not dispute it, because the execution of the power must have relation to the instrument creating it. The sole question is, what is the intent of the testatrix as to the *quantum* to be applied to the charity? There is no doubt but that she meant to leave that, as well as the mode of the charity, entirely to the discretion of her husband. They insist that it was to be an absolute £100 *per annum*: if this be so, the words “a sum not exceeding”, &c. must be entirely rejected: a construction which cannot be warranted. If it be construed, a fixed sum given by her will, with a power of appointing or reducing it vested in him, it is not within the statute, because it arises from the prior interest derived from her; but if she give nothing, and the whole power is executable or not at his discretion, then his appointment is within the statute of mortmain. There is no ground to construe an intent in favour of a charity more largely than any other.

[487]

The Lord KEEPER.

(After stating the case.) Upon these wills and instruments two several questions were made: First, The intent of Mrs. *Sedgewick*'s will: upon which it was insisted for the charity, that she gave an absolute annuity of £100.

No man of learning, law, or parts, could use words more distinctly expressing a discretionary power reposed in Dr. *Sedgewick*, than those made use of in this will. To comment on the words obscures them, and brings a cloud on the intent, which was glaring before.

The counsel, therefore, have resorted to the case of a charity, and suppose favour and partiality, and a measure

of justice different from the common measure to be dealt them: that is, that the court, for the interest of the charity, should make an intent for the testator; for if the court does not pronounce the intent which the words bear (which is abstract, and regards not the object), it does not declare the testator's intent; it defrauds the family, and acts not with the integrity of a court of justice, but the narrow spirit of a cloister.

It is true, and I am sorry for it, that there are old precedents in this court, where, by a perverse and mistaken construction of the statute of *Elizabeth*, this court enabled persons to give to charities, who had no power to do so by law; and it is as true that these precedents not only injured private families, but became a public nuisance, which called upon the legislature to interpose and stop them (a). But I found the equity of this court liberal and impartial, and no respecter of persons; and, please God, I will leave it so. And therefore I am quite clear that Mrs. *Sedgewick* intended that the Doctor should discretionally settle the sum.

It is then said, Suppose he had settled nothing? That, however, is not the case; but if it had been so, I should have referred the settlement to be made by the Master, and directed him to inquire what sum was proper to be settled, regard being had to the estate devised, and the circumstances and exigencies of the poor of the parish.

The second question is, as to the effect of the statute of mortmain on Dr. *Sedgewick*'s will: and I am of opinion that the execution of the power had relation to, and was part of the will, and therefore no more affected by the statute, than a will inchoate before the statute, where the

1700.
The
ATTORNEY-
GENERAL
v.
BRADLEY.

[488]

(a) See a remarkable instance of this alluded to in 69. See also the *Attorney-General v. Tancred*, ante, p. *Rumbold v. Rumbold*, 3 Ves. 10.

1760.
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BRADLEY.

testator died after it (a). The statute respected only the dispositions of owners, and not the case of persons executing a power given before it. I must therefore decree the establishment of the charity to the extent of Dr. *Sedgewick's* will.

(a) *Vide the Attorney-General v. Heartwell, ib. 234, neral v. Tyndall, post. Vol. and the cases there cited. II. 207. The Attorney-Ge-*

[ 489 ]  
 1760.  
 16th, 17th, 18th,  
 and 20th June.  
 S. C.  
*Amb. 540.*

The Earl of NORTHUMBERLAND v. The Marquis  
 of GRANBY.

*Et e contra.*

(*Reg. Lib. A. 1759. fol. 543*). (a)

Where testator gave to his son for his life the interest of a mortgage upon an estate, of which he was tenant for life in remainder at testator's death, and also the furniture in certain houses, upon condition of his executing a release of all claims he might have upon testator's estate, and of his not contesting the will: though the son lived fourteen months after the father's death without executing a release, and upon his first hearing the will, had expressed his dissatisfaction, and an intention of filing a bill; yet the circumstance of his never having paid any interest on the mortgage, of his having entered into possession of the furniture, and exercised acts of ownership, together with certain expressions of assent in his letters, were held to be evidence of his acceptance.

By the marriage settlement of *Charles, Duke of Somerset*, bearing date the 30th of *January, 1687*, the estates of the *Duchess of Somerset* were (*int. al.*) limited to trustees for a term of 500 years upon trust, if the said *Duchess* should die before the *Duke*, leaving issue male by him, to permit the heir male of the marriage to receive, during the *Duke's* life, from the time of his attaining the age of twenty-one years, the yearly sum of £3000 for maintenance, clear of all deductions.

(a) The statement of facts cause on the rehearing, A. is taken from the entry in 1767, fol. 187. the Register's book of this

By indenture, bearing date the 4th of *June*, 1707, it was agreed, that if the Duke should die in the lifetime of the Duchess, that then *Algernon*, Earl of *Hertford* (the eldest son of the said marriage), should, during the lifetime of the Duchess, receive the yearly sum of £3000, until some estate of the yearly value of £3000 above all reprises (public taxes only excepted), should be settled on him for life in possession.

1760.  
 ~~~~~  
 The Earl of
 NORTHUM-
 BERLAND
 v.
 The Marquis of
 GRANBY.

By an indenture, bearing date the 4th of *July*, 1715, made on the marriage of *Algernon*, Earl of *Hertford*, part of the Duke's paternal estate in *Wiltshire*, of the annual value of £1788, was limited to Lord *Hertford* in possession, and other part of the Duke's estates, subjected with an annuity of £1000 to him for life; with a declaration that the several lands and premises thereby provided for Lord *Hertford* for life in possession, were intended to be and accepted in discharge of only £2500 *per annum*, part of the £3000 *per annum*, provided by the first settlement.

[490]

Duke *Charles* had issue by *Elisabeth*, his first Duchess, only one son, who survived him or had issue, the said *Algernon*, Earl of *Hertford* (afterwards Duke of *Somerset*), and only one daughter, who had issue, viz. *Catherine*, the wife of Sir *William Windham*, who had issue *Charles*, late Earl of *Egremont*.

The Duchess died on the 10th of *November*, 1722, from which time this annuity of £3000 *per annum* commenced. His Grace, by his second wife *Charlotte*, Duchess of *Somerset*, had issue two daughters, *Frances*, afterwards Marchioness of *Granby*, and *Charlotte*, afterwards Countess of *Aylesford*.

By his will, bearing date the 5th of *July*, 1748, reciting, that he had by the several indentures therein mentioned, conveyed and settled the manors, &c. therein mentioned, to the use of his said two daughters in man-

1760.

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The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

[491]

ner therein mentioned; he by his said will confirmed the said indentures, and thereby willed, that the said several estates should be held and enjoyed accordingly, to the purport and intent of the said several deeds. He further devised all other his manors, &c. in the said several counties therein mentioned to trustees and their heirs in trust, for and subject to the same uses, trusts, limitations and conditions as were expressed in a certain indenture of release, bearing date the 21st of *February*, 1732; and also reciting, that by virtue of the several powers contained or expressed in the several settlements upon or since the said testator's marriage, several sums therein mentioned, amounting in the whole to the sum of £35,000, had been raised by way of mortgage on part of the manors, &c. which were to remain and come after his death to his son, the said *Algernon*, Earl of *Hertford*; all which said sums had been since paid off by him, and the mortgages for the same had been assigned over to trustees for his, the said testator's, own sole use and benefit, and remained as part of his own personal estate; but that he, being minded that the estates on which the said sums had been charged should remain and come to the said *Algernon*, Earl of *Hertford*, discharged from all the said incumbrances, and being also desirous that peace, good harmony, and friendship might be preserved between the said *Algernon*, Earl of *Hertford*, and his said two sisters; and also out of his paternal affection for his said son, and regard for those who should be entitled after him in remainder, the said testator thereby gave, demised, and remitted to him, the said *Algernon*, Earl of *Hertford*, all the said several sums so charged by way of mortgage on the said estates.

The testator then gave all his messuages, structures, buildings, lands, tenements and hereditaments which had been purchased by him and enclosed within the walls of

the courts, yards, &c. belonging to his mansion at *Petworth*, to be held and enjoyed along with his said mansion-house, as part of and belonging thereto, by the said *Algernon*, Earl of *Hertford*, during his life, and after his decease by such persons as should be entitled to such mansion-house in reversion or remainder, by virtue of the said settlements.

1760.
 The Earl of
 NORTHUM-
 BERLAND
 v.
 The Marquis of
 GRANBY.

The testator then gave to the said *Algernon*, Earl of *Hertford*, for his life, the use of the furniture which at the time of his decease should be standing and being in the several apartments and rooms therein mentioned in his mansion-house called *Sion House*; and also the use of the furniture which at his decease should be in his mansion-house called *Northumberland House*; and from and after the decease of his said son, the said testator gave the use of all the said furniture in the said three mansion-houses, to remain and go along with the said several houses respectively as heir-looms, &c.

[492]

Then came the following proviso: " Provided always, and my will and meaning is, that the before-mentioned gifts and bequests to my said son *Algernon*, Earl of *Hertford*, of the said several sums of money so due on mortgage as aforesaid, and the use of the furniture of my said three mansion-houses as aforesaid, is and are upon this express condition, that before my said son shall have any benefit of the said several sums of money so due on mortgages as aforesaid, or the use of any of the furniture as before mentioned, my said son shall, by sufficient deed or deeds by him duly executed, release to my wife, *Charlotte*, Duchess of *Somerset*, and my said daughters, all claim, right, title and demand, or pretence of right, title, claim and demand, which he or they may have, or pretend to have, either in law or equity, to all or any of the real or personal estates conveyed or settled by me unto, upon,

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

[493]

or in trust for them, or any of them, so given or devised by this my last will, and also ratify and confirm all and every the dispositions, devises, gifts and bequests by me made by this my last will; for my will and desire is, that my said son shall live in peace, &c. with my said wife, &c. without giving them, or my said trustees or executors herein named, any molestation, trouble or disturbance in the enjoyment of any of the estates, real or personal, conveyed, settled or devised by me to them, or any of them; and in case my said son should refuse or neglect to make such deeds of release and confirmation as aforesaid, or shall after my decease bring any suit or suits, action or actions, whereby or otherwise to attempt to set aside, disappoint, frustrate or avoid the effect of this my will, or any part thereof, or any former or other disposition, gift, or settlement made or to be made by me, of any of my estates, real or personal, or any part thereof; or in any manner molest, trouble, hinder or disturb my said wife and daughters, or any of them, or any other person or persons intrusted by or for them, or any of them, or claiming or acting under this my last will, or my trustees or executors, or any of them, in the use, exercise, enjoyment, or possession thereof, or any part thereof, in such or any of the said cases; my mind and will is, that the said several devises made to my said son of the said several sums of money so due on mortgage as aforesaid, and the use of the furniture of my said three houses, shall be null and void; and then and in either of the cases before mentioned, I do hereby give and devise the said several sums of money so due upon mortgage as aforesaid, and all the furniture of my said three houses, whereof the use is to devise to my said son as aforesaid, to my said two daughters for their own proper use and benefit."

The testator gave the residue of his personal estate to his said two daughters, whom he made executrixes of his will.

Duke *Charles* died on the 2d of *December*, 1748.

Duke *Algernon* never executed any release, and died 7th *February*, 1749, leaving the Countess of *Northumberland* his only daughter and heir at law; and having appointed the plaintiff, the Earl of *Northumberland*, and Mr. Justice *Forster*, his executors.

The bill in the original cause was brought by the executors of Duke *Algernon* against the executors and devisees of Duke *Charles*, for the sum of £13,000, being the arrears of the annuity of £500 *per annum* for twenty-six years; viz. from the death of the first Duchess in 1722, to Duke *Charles*'s death in 1748.

It was insisted by the answer to the original bill, that Duke *Algernon* was not entitled to the said £500, and that if he was, he had waived it by accepting to take under the will of Duke *Charles*; and the cross bill prayed that the arrears of the £500 might be declared satisfied, and that Duke *Algernon* had assented to his father's will, and accepted the bequests upon the terms therein mentioned, and might be decreed to execute a release, or otherwise be declared not to be entitled to any of the bequests given under the will, &c.

It was proved on the part of the plaintiffs in the first cause, that Duke *Algernon*, on being informed of his father's will, said it was hard that he should be debarred from any claim on his father's estate by consideration of the interest of a sum which was to sink into the estate at his decease; that he declared that he would not give a release till his claims were satisfied, and that he would file a bill: that he exclaimed the bequest was nothing: if his father had left him the principal, it might have tempted him. That he took possession of *Northumber-*

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

[494]

1760.

The Earl of
NORTHUM-
BERLAND

v.

The Marquis of
GRANBY.

[495]

land and *Sion House* before he could know the contents of the will: that they were both out of repair, the furniture being so bad that it required above £1000 to be laid out to make them habitable.

It appeared on the other side, that Duke *Algernon* never offered to pay any interest for the mortgage of £35,000; that immediately upon Duke *Charles's* death he took possession of *Sion House* and *Northumberland House*; sent his steward and workmen into them; had the pictures cleaned, the furniture beautified and altered, and some of it sold. That he also sent persons down to *Petworth* to take an inventory of the furniture, and bought some hay and lead that were on the premises. Several letters were read from him to the Duchess: in one, dated 30th *December*, 1748, he expressed himself as to the goods at *Petworth*, “Mr. *Harpur* is to be present at the taking away the goods left to you and my sisters. I don't foresee any dispute.” In another, dated the 10th of *January*, 1749, he gave her permission to leave some horses at *Petworth* for a short time, if convenient to her. In a letter of the 25th of *April*, 1749, he said, that since it was necessary to prove his father's will in Chancery, an amicable bill should be filed, to which he ought to be made a party; and that as in point of form it would be necessary for him to put in an answer, he would give orders to have it done.

The *Solicitor-General*, Mr. *Sewell*, Mr. *de Grey*, and Mr. *Cowper*, for the plaintiffs,

Observed, that there were three principal questions in this case: First, Whether Duke *Algernon* was entitled under the settlements to the annuity of £500? It was said that there was no intimation that the £1000 *per annum* was taken as any part of the £500; nor could the acquiescence of Duke *Algernon* affect him: that the court will distinguish between the case of acquiescence between

strangers, and that of a parent and child. Lord *Grey* v. Lady *Grey*, 1 Ch. Ca. 296. *Benson* v. Col. *Carpenter* (a).

Upon the second question, whether Duke *Algernon* could demand the arrears consistently with the will? it was urged that he could: that this was a debt, and affected only the residuary legatees: that the devise of the residue must be understood after payment of debts.

The third question made was, whether Duke *Algernon* had accepted the devise? It was contended, that the release was a condition precedent which required strict performance: that Duke *Algernon* had a right to have his claim to £500 *per annum* settled, and therefore he was not to be presumed to have made an election before that point was determined: that the not executing the release was direct evidence of non-acceptance: that he had not made up his mind to accept or not; and they relied upon his declarations of dissatisfaction, and intentions of filing a bill: that it would have been disadvantageous for him to have accepted the devise.

The *Attorney-General*, Mr. *Harvey*, and Mr. *Wilbraham*, for the executors of Duke *Charles*; Mr. *Perrot* for Lord *Egremont*.

The Lord KEEPER.

This is a cause between great persons, and has been fully discussed at the bar; but, for my part, I do not think the point of any great difficulty or importance, except the value, which is a sum of £13,000.

The bill is brought for the arrears of an annuity of £500, payable under the settlement in 1687, from the death of the first Duchess of *Somerset*, who died in November, 1722, to the death of *Charles*, Duke of *Somerset*, in December, 1748. The annuity is admitted never to have been demanded from Duke *Charles*, or from the

(a) Qu.?

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

[496]

1760.

The Earl of
NORTHUM-
BERLAND
v.
The Marquis of
GRANBY.

trustees of the term of 500 years, created by the settlement for raising the annuity of £3000, of which this £500 was part. The bill is now first brought by the executors of Lord *Hertford*, afterwards Duke *Algernon*, for payment of those arrears out of the assets of his father, Duke *Charles*.

Several questions have been made by way of bar.

1st. That the annuity of £500, as commencing from 1722, was extinguished by the settlement of 1715.

This brings the several settlements under consideration.

By the settlement of 1687, a term of 500 years was created, not for Lord *Hertford*, but for the heir male of the marriage before he was born, who was to receive £3000 a-year after twenty-one, and the duchess's death, during the life of the duke, clear of deductions.

By the settlement of 1707, Lord *Hertford* was to receive £3000 *per ann.* from the death of the duke, in case the duchess survived, till some estate of the yearly value of £3000 above reprises, should be settled on him for life in possession.

By the settlement of 1715, specific lands of the yearly value of £1788, and an annuity of £1000 a year, were limited to Lord *Hertford* in possession; with a proviso, to be in discharge of £2500 a year, part of the £3000 a year by the settlement of 1707.

It is clear, by the settlement of 1687, Duke *Algernon* would have been entitled to £3000 a year on the death of his mother; and it is as clear that by the settlement of 1715, the lands of the value of £1788 a year are accepted as £2500 a year, part of the £3000 a year. And there is no intimation that the £1000 annuity was intended, nor could it be taken in satisfaction of any part of the £3000 a year.

But the defendants object acquiescence and the statute of limitations, Duke *Algernon* never having demanded it.

As to acquiescence, it can only operate either as proof or presumption of actual payment, which is not insisted on by the answer: or as a tacit gift, which was never intended. On the contrary, it is proved that Duke *Algernon* thought himself injured by withholding the annuity. Besides, acquiescence between a father and son is an act of piety. In the case of Lord and Lady *Grey*, which came before Lord *Nottingham*, he held the receipt of rents and profits by the son was no evidence of a trust for the father. Lord *Hertford* seemed to have retained an implicit obedience to parental authority: if therefore the case had rested here I should think myself obliged to decree for the plaintiff; but Duke *Charles* has made his will, and given his son legacies, with a precedent condition annexed.

From this will it is as plain as words can express it, that Duke *Charles* did not intend that Duke *Algernon* should have the legacies, and a satisfaction for his other claims; but that if he had one, he must relinquish the other.

Great stress was laid on the circumstance of the executors having, by the advice of Sir *Thomas Bootle*, paid £200, the arrears of the £1000 *per ann.* due at Duke *Charles*'s death. I think Sir *Thomas* acted with his usual judgment in advising them to do it: it was a compliance with the spirit of the will. The release required by the will was restrained to pretended claims only. Duke *Charles* never meant to exclude Duke *Algernon* from any thing he was in possession of, but only from such claims as he had disputed or denied during his life. The executors might as well have withheld the arrears of rent of the *Wiltshire* estate, as the arrears of this annuity of £1000.

Another objection was made, as preliminary to the last point, as to the extent of what is called a forfeiture. I do

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

[498]

1760.

The Earl of
NORTHUM-
BERLAND
v.
The Marquis of
GRANBY.

[499]

not call it a forfeiture, but a want of performing a condition precedent, to attach by way of legacy, and to make that legacy existing in the will. I am clear the intent of this will, as collected from the proviso, was, that if Duke *Algernon* should refuse to comply with the terms of the devise, Duke *Charles* intended to strike the legacies to him out of the will, and to revoke and make them void to all intents and purposes. The legacies were given to establish harmony in his family. He could not intend after his son's death, who was sixty-four, to give them over; but he intended that Duke *Algernon's* daughter should, after her father's death, take the benefit of the furniture in *Northumberland House* and *Sion House*, and Lord *Egremont* the furniture at *Petworth*: and I am satisfied he worded his will for such a construction. That he intended the release as a condition precedent, that if it was not made, "what I intend to give to Lord *Hertford*, and his children, and nephew, I will give to my daughter;" and the more so, as in the clause of forfeiture, it is the same to all in remainder, as it is to Lord *Hertford*.

I think therefore this would create an absolute interest in the daughters in the furniture and the mortgage money, in case of this refusal.

The legacies being then given on conditions precedent, it makes the material question simply this, which, as Mr. *Attorney-General* says, is a question merely of evidence, has Duke *Algernon* taken and received the legacy? If he has, he must perform the condition; it being a standing maxim in equity, *qui sentit commodum, sentire debet et onus*.

Now there cannot be a stronger evidence of an election. Duke *Algernon's* acts hardly bear a comment, nor do they admit the least controversy. He survived his father fourteen months: he had a copy of the will immediately,

and was attended by persons very able to give him cautionary advice. He never offered to pay one shilling interest on so large a sum as £35,000, the mortgage debt. By not paying the interest he received it the same as if it had been owing by a third person: he retained it to himself as a legatee.

What was his conduct as to the furniture? If he had only entered and let the furniture continue, even if he had used it till taken away, I should have thought the construction rigorous; but he sold it, and converted it entirely. As a legatee he had certainly a right to do so, but no way else: as in the case of a condition annexed to the legacy of a diamond, the sale of the diamonds is an acceptance of the condition. His receipt shews his conduct as to the rest. He purchased the hay and lead, and why not the furniture, unless he took it as a legacy? Consider his letter to the Duchess of 25th *April*, 1749, in which he says, That since it was thought necessary, in order to prove his father's will in chancery, an amicable bill should be filed, to which he ought to be made a party, and that in point of form it would be necessary for him to put in an answer, he would give orders to have it done. Had he insisted by his answer on all his claims, would it have been amicable? I should call it something of the most indelicate nature, if he had done so after such letters had been written.

What is the answer to all this? *Stirrock* and *Harpur* say, for their evidence amounts to this, that Duke *Algeron* said he would not execute a release till his claims were adjusted; and that he ordered *Harpur* to bring a bill. It appears to me that he was encouraged by his counsel, to think he could set up his claim to the annuity consistent with the will; but I am clear he could not. His conduct shews that if he could not have both, he intended at all events to take the legacy. He received the

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

[500]

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

interest; he took the furniture; this shews that he had made his determination. "I will have these things adjusted; if not I will bring a bill: but I have shewn I will ultimately, at all events, abide by the will." The value of the furniture of all the houses is not proved; such part as was at *Petworth*, where the Duke constantly resided, and sometimes in great splendour, must have been considerable. The other houses may be considered as abandoned.

I can suggest many reasons why he should elect the legacy given by the will, without weighing the value either way. It was consistent with his quality, with that filial piety which had displayed itself during his life; his obedience to his father's last injunctions and recommendations in his will: it was consistent with his estate and years. Lady *Northumberland* was his daughter, Lord *Egremont* his nephew. Shall I begin at sixty-four to new furnish all my houses, and leave upon the estates of my daughter and nephew a mortgage of £35,000?

But I will go a step further, and suppose Duke *Algernon* had declared ever so often, and in words, his refusal to take the legacies on the terms in the will, it would have made no difference with me; I should still have been of opinion he had accepted, not on the foundation of precedents, but on certain principles of law; that no man shall be admitted to qualify his own acts, is a fundamental maxim of law.

Put the case another way: Suppose it had been the case of a covenant between Duke *Charles* and Duke *Algernon*, that if Duke *Algernon* accepted the furniture within fourteen months, he should then release all his claims on the estate of Duke *Charles*; and suppose he had accepted the furniture of Duke *Charles*, and had then come into this court for a specific performance of the covenant, would not the court have decreed a release?

Now I consider the acceptance of a conditional legacy as a contract or a debt; and that if you accept it, you take it with the condition annexed.

Dismiss the bill, so far as prays payment of the £13,000 arrears of the annuity; and the executors of Duke *Algeron* to execute a release, pursuant to the will of Duke *Charles*.

1760.

The Earl of
NORTHUM-
BERLAND

v.
The Marquis of
GRANBY.

This cause was reheard before Lord *Camden*, in consequence, probably, of the opinion of the *House of Lords*, in reversing part of the decree of Lord *Northington* in the case upon the will of the Duke of *Montague*, *Amb.* 533, in which it was held, that the right to elect lasted till the whole of the testator's affairs had been wound up, and the *trusts executed, a period of upwards of fifty years. 3 *Bro. P. C. Ed. Toml.* 277. That decision has, however, always been disapproved of. *Butricke v. Broadhurst*, 1 *Ves. jun.* 171. *S. C.* 3 *Bro. C. C.* 88. *Freke v. Lord Barrington*, 3 *Bro. C. C.* 274. In *Wake v. Wake*, 1 *Ves. jun.*

335, *S. C.* 3 *Bro. C. C.* 255, Lord *Eldon*, then *Solicitor-General*, observed, that he had heard Lord *Thurlow* say, over and over again, that the case should never bias any other, where there is the least difference between them, and accordingly we see that Lord *Camden*, upon great consideration, affirmed the present decree. *Amb.* 657.

The present case was relied upon in *Simpson v. Vickers*, 14 *Ves.* 341, but the circumstances of that case were totally dissimilar, as there the devisee could not be considered as possessing the estate under the devise, being the heir at law, and having entered contesting the will.

[*502]



1760.
10th and 11th
Nov.

FORBES v. PHIPPS.

(Reg. Lib. A. 1760. fol. 66.)

Where a *feme covert* was entitled to one-sixth of the residue of a testator's estate, upon a bill filed by another residuary legatee, to which she and her husband were defendants; a decree was made for a sale of the estate and payment: held, that her share vested absolutely in her husband by the decree; and though the defendants were creditors of the wife, yet that the court would interpose to take the money out of their hands.

[*503]

THOMAS HUTTON by his will, bearing date the 4th of September, 1725, devised to *Francis Taylor*, *Samuel Dawson*, and *Richard Dawson*, their heirs and assigns, all his lands; and gave to them, their executors, administrators, and assigns, all his personal estate, in trust to sell his lands for the best price that could be got; and out of the money that should arise from the same, and out of his personal estate, to pay all his debts, &c.; and he gave the residue to his four sisters, in equal portions; and on the death of any of them without issue, directed her share to go to his six nephews and nieces therein named; and if any of such nephews and nieces should *be then dead leaving issue, his or her share to be paid to his or her children; and after the death of the survivor of his said four sisters, the produce of his real and personal estate to be paid in like manner to his said nephews and nieces, or their children.

All his four sisters died without having any further issue than the nephews and nieces named in the will. *Elisabeth Dawson*, one of the nieces so named, in 1716, married *Samuel Hilary*, who died in 1720, leaving by her one son, *Thomas Hilary*; and she afterwards, in 1729, married *Thomas Jekyll*.

Bryan Dawson, one of the testator's nephews, after the death of the last of the four sisters, which happened in 1734, filed a bill for an account and payment of his share of the residue of the testator's estate; to which bill the executors named in the will, and Mr. and Mrs. *Jekyll*,

and the other nephews and nieces, were defendants. A decree was made on the 14th *November*, 1737, to establish the will, &c.; directing a sale of the real estate, and an account, &c.; and that the whole should be divided into six equal parts, and one sixth part be paid to the plaintiff, one other sixth part to the defendants, *Thomas Jekyll*, and *Elizabeth* his wife, &c.

Samuel Hilary, the first husband of Mrs. *Jekyll*, by his will, dated the 18th of *March*, 1720, devised his real estates (after charging them in favour of his said wife in manner therein mentioned) to his only son, *Thomas Hilary*, and his heirs, for ever, in case he should attain the age of twenty-one years; and in the mean time directed that his wife, whom he made his executrix, should receive the rents and profits, and apply such part thereof to his maintenance and education as should be reasonable, &c.

Mrs. *Hilary*, as executrix of her husband, and also of her aunt, *Eleanor Hutton*, had become indebted to the estate of her son, *Thomas Hilary*, for three several sums of £2000, £105, and £5 5s. She afterwards died in the lifetime of her husband, Mr. *Jekyll*, on the 15th of *December*, 1742: *Jekyll*, in 1743, married the plaintiff, afterwards Mrs. *Forbes*; and he dying in *August*, 1744, she married the plaintiff, *Forbes*, on the 5th of *February*, 1745.

This was a bill brought by *Forbes* and his wife against the executors of *Bryan Dawson*, who had received the purchase money for the estate, and was sole executor and residuary legatee of *Thomas Hilary*, and administrator, with the will annexed, of *Samuel Hilary*, unadministered by *Elizabeth Hilary*, afterwards *Jekyll*, and also administrator of *Elizabeth Jekyll*, unadministered by *Thomas Jekyll*, &c. It prayed an account, and payment of

1760.
FORBES
v.
PHIPPS.

[504]

1760.
 ~~~~~  
 FORBES  
 v.  
 PHIPPS.

the sum of £1578 19s. 3d. being one sixth of the estate of the testator *Hutton*.

The *Attorney-General*, the *Solicitor-General*, and Mr. *Stainsby*, for the plaintiffs,

Contended, that the right to this sum survived to *Thomas Jekyll* from his wife *Elizabeth*; they cited *Obrian v. Ramm*, *Carth.* 30. *Woodyer v. Gresham*, *ib.* 415. 1 *Salk.* 116. *Nannev v. Martin*, 1 Ch. Ca. 27. 1 *Can. Rep.* 234. *Heard v. Stamford*, 3 *P. W.* 409 (a).

Mr. *Sewell*, Mr. *de Grey*, and Mr. *Wilbraham*, for the defendants.

This is a hard case against the defendants. Mr. *Jekyll* obtained 7 or £8000 by his wife, having nothing of his own. In general a decree for payment to husband and wife will survive; but then the husband takes it subject to all demands upon it. *Bachelor v. Bean*, 2 *Vern.* 61. *Sanderson v. Crouch*, *ib.* 118. *Pagett v. Hoskins*, *Prec. Can.* 431. *Earl of Thomond v. Earl of Suffolk*, 1 *P. W.* 461. In all the cases at law, where the choses in action of the wife were held to survive, some act had been done by the husband to reduce them into possession. In the present case no act has been done by him: he was a defendant, and the decree was made without his intervention. It might have been a decree *in invitum*. If the husband had brought his bill during the wife's life, the court would have retained a bill, brought by the defendants, to impound this fund for the creditors.

[ 505 ]

*The Lord KEEPER.*

*Henry Hutton* devised his real and personal estate to his four sisters successively, with a remainder to his

(a) *Vide*, also, *Marder v. Allaway*, 8 T. R. 257. *Cooper Lee, Burr.* 1471. *Cowrie v. Hunchin*, 4 *East*, 521.

nephews and nieces, six in number; the last of whom died in 1734, and the devise over took place. One of the six was *Elizabeth Dawson*, who first married, in 1716, with *Samuel Hilary*, who died in 1720; and she, in 1729, married *Thomas Jekyll*, and died in 1742. In 1743 *Jekyll* married, and died in 1744; and his widow, in 1745, married the plaintiff *Forbes*.

1760.  
FORBES  
v.  
PHIPPS.

A bill was brought in 1734 to establish *Hutton's* will, and carry the same into execution. *Bryan Dawson*, one of the six, was plaintiff, and Mrs. *Jekyll* and her husband were among the defendants. There was a decree in 1737, proper accounts directed, a sale ordered, and the residue to be divided among the six, and *inter alios*, one-sixth to *Thomas Jekyll* and his wife.

Mrs. *Jekyll*, who was first Mrs. *Hilary*, entered upon the estate of her infant son, *Thomas Hilary*, and was accountable for the rents and profits of his estate; and as representative of her husband, *Samuel Hilary*, was accountable for his personal estate, to pay £2000 due on the marriage articles, and £100 to her son, as representative of *Eleanor Hunt*.

Upon this state of the case, the plaintiff claiming under *Thomas Jekyll* as having married his widow and representative, insists that this one-sixth, decreed in 1737 to *Thomas Jekyll* and his wife, vested by survivorship in *Thomas Jekyll*, and was no part of the estate or assets of his wife. The defendants, on the contrary, insist that this vested in him as assets, or *quasi* assets, of his wife, and ought to be charged with the defendant's claims in the right of *Thomas* the son; or at least, that the defendants having acquired the possession of the money, and being creditors of *Thomas* on the first Mrs. *Jekyll*, this court should not take it out of their hands.

[ 506 ]

But with regard to this court's standing neuter, that entirely depends on the merit of the defendant's claim,

1760.  
 ~~~~~  
 FORBES
 v.
 PHIPPS.

which results back to the real rights of the parties. For if these are the assets of Mrs. *Jekyll*, the first wife, of whom I must now take the defendants to be creditors, they have an equitable right to retain, and a court of equity cannot interpose against them.

I must, however, contradict the position of the defendants' counsel, that if Mr. *Jekyll* had brought his bill for this one-sixth, living his wife, I could have retained a bill brought by the defendants to impound this fund for the creditors: though I might have secured the wife if unprovided for. And I am warranted by the highest authority in saying this; viz. the case of *Mason v. Masters*, determined 30 Car. 2. by Lord *Nottingham*. There the defendant, being a mean and indigent man, stole a marriage with one that had £500: half was paid down, half was secured by bond: the defendant sued the bond. Lord *Nottingham* says, I restrained this suit till some provision was made for the wife out of the money; and at the same time dismissed a bill brought by a creditor of the husband against the trustee of this bond to pay him out of this security, which was a kind of attachment in equity (a).

[507]

Besides this, whenever a man has an equitable right, this court must determine it; for being without remedy at law, if he were also without remedy here, he would be with and without right, which is a contradiction in terms. And this rule is universal, except where the jurisdiction is repelled by an equal or superior equity.

The question, therefore, is reduced to an inquiry what right Mr. *Jekyll* acquired by his marriage and the decree: that is, whether he took this one-sixth by the decree and survivorship, or as administrator to his wife.

And first, it is clear that if this money had been paid

(a) *Vide* Earl of *Salisbury v. Newton*, ante, 370.

during coverture, without a suit in right of his wife, it could not, on survivorship, have been liable to any of her debts not adjudged during coverture; and this has always been law; and if there was any reason to the contrary, yet it is beyond the authority of this court to alter it.

1760.
FORBES
v.
PHIPPS.

But in choses in action, which can only be recovered in a course of representation as the estate of the wife, the case is different, and the law is otherwise.

But a decree is equal to a judgment at law, which operates to vest the property, joint or separate, pursuant to the decree (a): and even an award is sufficient for that purpose. *Oglander v. Baston*, 1 Vern. 396. The plaintiff being entitled to the personal estate of J. S., and a difference arising between the plaintiff's husband and the executor, touching the *quantum*, it was referred to arbitration, and an award was made of a sum to be paid to the plaintiff's husband: before any payment he dies: the wife brought her bill, supposing it to survive to her. *Lord Chancellor*. The award is a sort of judgment, and that has changed the property, and vested it in the husband. And in the same case the court said, If there be a bond debt due to the wife, the husband may sue without joining his wife; but if the wife is joined, and judgment is recovered, the judgment will survive to the wife; but not being joined, the judgment will vest in the husband. And in the case of *Squib v. Win*, 1 P. W. 378., it was held, that a voluntary assignment of the wife's choses in action altered the property.

[508]

I cannot find any sound reason or authority to distinguish between the operation of a decree on a plaintiff or defendant; but I think a defendant's appearing, and

(a) See the note at the end of the case, from which it is clear that this proposition is not correct.

1760.
 ~~~~~  
 FORBES  
 v.  
 PHIPPS.

submitting to the jurisdiction of this court, is much stronger than submitting himself to private arbitration.

I am therefore of opinion, that by the established rules of law and equity Mr. *Jekyll* took this one-sixth by survivorship, and not subject to the debts of his first wife (a).

(a) In a case in *Aleyn*, 36, cited by Lord *Hardwicke*, in *Garforth v. Bradley*, 2 *Ves.* 675, it is said that the husband's bringing an action in his own name, and obtaining judgment, will prevent a chose in action surviving to the wife: but Lord *Comper*, in *Packer v. Wyndham*, Prec. Can. 415., and Lord *Hardwicke*, in *Bond v. Simmons*, 3 *Atk.* 20, considered that it would not have that effect if he died before execution; therefore the above determination of Lord *Jeffries*, in *Oglander v. Baston*, that a sum of money awarded to the husband was in the nature of a judgment, and had changed the property, though relied on by Lord *Northington*, seems questionable. Nor, it should seem, would a decree of a court of equity, of itself, have that effect: though equal in extent and operation to a judgment at law, it is not superior to it; it does not pass property, but merely declares the right existing by antecedent title and

disposition. *For.* 217. 10 *Ves.* 587. And it is also clear, that where money has been paid into court under a decree for the husband to propose a settlement, such payment will not give him the absolute interest in the property; *Bond v. Simmons*, cit. sup. *Macaulay v. Philips*, 4 *Ves.* 15., the determination in *Packer v. Wyndham*, to the contrary, being obviously erroneous.

The present case, however, as well as that of *Heygate v. Annesley*, 3 *Bro. C. C.* 362, are distinguishable from the circumstance of there being an order for payment of the money, which is widely different from the direction in *Bond v. Simmons*, and *Macaulay v. Philips*, where payment into court was held not to change the property, the court thereby merely substituting itself for the trustee. Taking the fund into its hands, and exercising its usual equity, it refuses to pay out that fund,

except upon the condition mentioned in the order, which, to use the language of the counsel in *Packer v. Wyndham*, is in the nature of a condition precedent: and the husband not having performed his part thereof, has no title to the fortune. But in the other case, the court not exercising any control over the fund, declares the rights of the parties, and orders payment. The whole transaction is completed, and therefore differs from a judgment at law,

where an ulterior step must be taken by the party recovering to make it operate upon the thing recovered; viz. suing out a writ of error.

That the assignment for valuable consideration by the husband, of the wife's reversionary choses in action, does not amount to such a reduction into possession as to change the property, *vide Lee v. Hornsby*, 2 *Mad. Rep.* 16. *Purden v. Jackson*, 1 *Russ.* 1.

1760:

FORBES

v.

PHIPPS.

BOSON v. STATHAM.

(*Reg. Lib. A.* 1760. *fol.* 38.)

*THOMAS DAVILL*, being seised and possessed of a considerable real and personal estate, by his will, dated 17th *July*, 1745, devised all his real estates to *Robert Dawson*, the defendant *Statham*, and *John Harris*, to hold to them, and the heirs of the survivor of them, for ever, subject to an annuity to one *Hester Good*, and also to the payment of the sum of £50 to *John Boson*, his heir at law, to be paid one month after his decease; and his will was, that his heir at law, upon receipt thereof, should release and discharge all his messuages and lands, so given as aforesaid, unto the said trustees, and to the heirs of the survivor of them; and all his personal estate he bequeathed

1760.

Nov. 14th, 15th, & 17th.

S. C.

1 *Cor.* 17.

*Amb. MSS.*

Devise by will, attested by three witnesses, to *A. B.* and *C.*, and the heirs of the survivor: the bill stated, that it was upon a secret trust for a charity declared by an instrument executed at the same time as the will, and attested by two witnesses only, which was admitted by the answer: held, that the devise

was void under the statute of ~~mortmain~~.

1760.  
Boson  
v.  
STATHAM.  
[ \*509 ]

to the said *Robert Dawson*, whom he made his executor.

\* This bill, which was brought by the heir at law, and the personal representative, stated the above will; and that the former, being ignorant of his rights, executed a release. That it had been since discovered that the devises and bequests in the said will were not really intended for the benefit of the devisees and legatee, but were in trust for a charity, void by the statute of mortmain: that the testator by an instrument, bearing even date with his will, and attested by two witnesses only, after taking notice of the statute of mortmain, requested his executors to lay out the surplus of his personal estate in the purchase of houses and land for erecting a school-house in the parish of *Hinckley*; and also requested his trustees to settle his real estates to the same uses, with power to choose other trustees, &c.

The bill charged that such disposition was void, and prayed that the will might be set aside, and also the release, as obtained by fraud.

The defendant *Statham*, the surviving trustee, by his answer, admitted the instrument as set forth in the bill, and submitted the construction and effect of it, and of the intention of the testator as expressed therein, to the judgment of the court. That he was advised, and submitted to the consideration of the court, that as the said will was duly executed and attested so as to pass real estates of inheritance, and as the said estate and premises were absolutely devised without any charitable use or trust appearing on the said will, either expressed or implied, the said real estate was well and effectually devised to them; and that the defendant now is, as surviving devisee, entitled to the said real estate, to hold to him and his heirs for ever, by virtue of the said will; but he no where stated

that the trustees were to take any beneficial interest to themselves.

\*The *Solicitor-General*, Mr. *Sewell*, and Mr. *Bicknell*, for the plaintiff.

The question is, whether this was not a resulting trust for the benefit of the heir at law and next of kin. There is no doubt but that a paper writing is a sufficient declaration of trust of personal estate; but the great question is as to the validity of this instrument to control the real estate, being only attested by two witnesses. It must be admitted, that if this declaration were a declaration of a legal trust it would be void; but the policy of the law, which endeavours to prevent frauds as well *in legem* as *in equitatem*, by evasions of the statute of mortmain, will receive this instrument as evidence of the secret trust: and in this respect the court will act with the same strictness that it did in the cases on the popish acts. In *Unitt v. Bartlett*, 15th June, 1757, on a bill to have a discovery of a trust for a papist, a demurrer, because disabling himself, was overruled; and in *Panton v. Lorrain*, 27th May, 1758, before your Lordship, defendant being charged to be a trustee for a papist, an issue was directed. So also in cases of superstitious uses. In the *Attorney-General v. Jones*, 21st June, 4 Jac. 2. there was a conveyance of lands to erect a chapel; the bill charged that it was intended for a mass-house, and a trial being directed which found it so, the court decreed for the crown: so also in the other cases cited in the arguments upon *Adlington v. Cann*. In *Edwards v. Pike* (a), your Lordship being of opinion that the trustees took the estate on a promise, declared the devise void.


The *Attorney-General* and Mr. *Wilbraham* for the defendants.

The question is, whether this instrument infects the

(a) *Ante*, 267.

1760.  
  
 BOSON  
 v  
 STATHAM.  
 [ \*510 ]



1760.  
  
 BOSON  
 v.  
 STATHAM.

will that gives this estate to the defendants; whether it be evidence of the intention or not; if it is testamentary there is an end of it, for the devise can neither be controlled nor revoked, except with the formalities required by the statute of frauds. *Wagstaff v. Wagstaff*, 2 P. W. 258. *Attorney-General v. Barnes*, 2 Vern. 597. And Lord *Hardwicke* thought, in *Adlington v. Cann* (a), that the breaking into the statute of frauds was a much greater mischief than evading the statutes of mortmain. Even supposing the testator means a trust for a charity, yet it does not appear that the trustees mean to execute it. There is an appearance perhaps of an attempt to evade the act, and the alarm it excites is considerable; but the liberty of this country must have its full force where the law has not positively restrained it: thus all the old statutes of mortmain were evaded. Clandestine marriages, till the late act, were in daily practice, and are even now not completely prohibited. Gaming, though always illegal, has never been effectually stopped. The statute of mortmain extends to such trusts only as can be declared in a court of equity, and not to honorary trusts, which depend merely on the conscience *boni viri*. If these are found an evil, there must be a new appeal to the legislature. The trust in *Adlington v. Cann* was as complete as it is here, but Lord *Hardwicke* found himself compelled to dismiss the bill; and if there is no trust the devise is absolute, and parol evidence cannot be admitted to raise an equity in a will. *Brown v. Selwin*, For. 240.

*The Lord KEEPER.*

I have considered this question with attention, and it seems to me that these two instruments are full of craft and evasion of the law of the land, i. e. the statute of

(a) 1 Atk. 141.

mortmain. The statutes of mortmain began with *Magna Charta*. I have heard the late *Lord Chancellor* go through them all, and conclude with saying, he thought they had been rendered ineffectual by the interpretation which had been put upon them by courts of justice (a). This is a melancholy hearing to the subject. For my part I will support the law as far as I can, without shaking things which are established.

1760.  
Boson  
v.  
STATHAM.

The question is no more than this; whether, since the statute of mortmain, a man can devise to a charity on an honorary trust in defiance of the legislature, which has forbid all devises of land in trust for charities. I will always support what I had already laid down on former occasions, *nemo potest facere per obliquum, quod non potest facere per directum* (b).

But what stands in my way to prevent my declaring this a resulting trust? The first objection is, that the beneficial devise to the trustees and their heirs, by the will, is not to be revoked or controlled by the second instrument, it not being executed according to the statute of frauds; and therefore it only can be taken as an honorary trust, and as such is not within the statute of mortmain. This is as much as to say, that being a fraud against both acts it is not within either. Secondly, that it will be more

(a) The order in which these statutes were enacted is as follows: 36 *Hen.* 3. c. 36. (*Magna Charta*.)—7 *Edw.* 1. st. 2. (*De Religiosis*.)—13 *Edw.* 1. st. 1. c. 22. (*Westm.* 2.)—18 *Edw.* 1. c. 3. (*Quia Emptores*.)—34 *Ed.* 1. st. 3. (Of amortizing lands.)—18 *Edw.* 3. st. 3.—15 *Ric.* 2. c. 5.—23 *Hen.* 8. c. 10. s. 2, 3, 4, 5.—7 & 8 *Will.* 3. c. 37. s. 1, 2. (enabling the crown to license alienations in mortmain.)—9 *Geo.* 2. c. 36. (*Mortmain Act*.) See a concise History of Mortmain, 2 *Bl. Com.* 268, and *Duke's Charitable Uses* by *Bridgman*, 192.  
(b) *Ante*, 417.

1760.  
 ~~~~~  
 BOSON
 v.
 STATHAM.

inconvenient to let in fraud and perjury by than to let in devises to charities by opening the statute of mortmain, when they come in competition.

It is remarkable that this question of a trust, declared on a will by an instrument not attested with the solemnities of the statutes of frauds, has not been agitated, except in the case of *Adlington v. Cann*, which I shall observe upon hereafter.

Suppose this to have been the case of a voluntary settlement. On a sound construction of the statute of frauds, and consideration of the nature of trusts precedent to that statute, I am of opinion that this second instrument would have been a sufficient declaration of trust.


As to the case of *Adlington v. Cann*, when it is considered, no difference will be found between Lord *Hardwicke's* opinion in that case, and mine in the present. Three questions were made in that case, but not accurately; for the second was made merely to introduce the old argument, that the court would go further in the case of a charity than in any other. In answer to which the *Attorney-General v. Spillet* (a) was cited, to shew that charities stand on the same ground with others, and to which every man of sense subscribes; but the only ground of the decree in that case was on the third question, the uncertainty, it being uncertain what was to be given to the charity (b).

(a) 3 *P. W.* 344. Affirmed by Lord *Hardwicke*, 2 *Atk.* 148.

(b) Lord *Eldon* has pointed out the grounds of Lord *Hardwicke's* determination. There being nothing in the will attaching a trust, if the testator afterwards, by an unattested

paper, expressing his own intention, not communicated, said, the purpose was to devote the estate to a charitable purpose, the devisee might object he had taken under a will well executed, and the subsequent paper was not well executed. 9 *Ves.* 519.

In *Newton v. Pelham*, 2 August, 1746, on a bill to discover a secret trust, the answer said it was not for the benefit of the plaintiff. On exceptions it was held insufficient, for the defendant made himself judge of the title; and it was said, *per curiam*, perhaps it might be a trust for a charity.

1760.

 BOSON
 v.
 STATHAM.

The present case is extremely different from *Adlington v. Cann*, for there the will and the paper declaring the trust were executed at different times, and therefore there was more room to say it required the solemnities of the statute of frauds; but here the execution of the will and of the trust were at the same time, and the declaration of trust incorporated into the creation of the estate.

But I will speak openly, and declare my opinion generally, that a writing signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses, according to the solemnities of the statute of frauds.

The statute of frauds was not meant to prevent persons taking trust estates, but only to regulate the proof of them. The statute of mortmain meant to prevent a particular species of trusts, i. e. trusts for charities. The one struck at imposture, the other at weakness and superstition. The statute of mortmain meant to prevent honorary trusts, or devises for charities, *quâcunque arte vel ingenio*; and the honorary trust infects the will as much as if it were declared in the most solemn manner. To admit a distinction would be to overturn the resolutions on the popish acts, which I by no means intend to do.

Declare, that the devise of the real estate to the several devisees, and the heirs of the survivors of them, and likewise the bequest made of the personal estate to the residuary legatee and executor, were an intended trust for

1760.
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 Boson  
 v.  
 Statham.

the benefit of a charity, and were as such void by the late statute of mortmain, so far as they relate to such charity, &c. (a).

(a) This subject has been lately much discussed, and it appears from the cases, that the doctrine is now established as follows: If the will contains a sufficient denotation of the intention that the devisees should be trustees (a circumstance which failed in *Adlington v. Cann*), and the heir claiming upon the ground that the trust is ineffectually disposed of, alleges, by his bill, a trust against the policy of the law, such bill must be answered; and if it appears, by the admissions of the answer, that there was a secret trust for a charity, there will be a resulting trust for the heir. *Edwards v. Pike, ante*, 267. *Muckleston v. Brown*, 6 *Ves.* 52. *Martin v. Hutton*, and *Bishop v. Talbot, cit. ib.* *Stickland v. Aldridge*, 9 *Ves.* 517. *Paine v. Hall*, 18 *Ves.* 475.

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1691-1784.

June 19th, 1759.  
 22d Nov. 1760.  
 S. C.

1 Cox, 15.  
*cit. 4 East*, 577, n.

### BARTLETT v. PICKERSGILL.

(*Reg. Lib. A.* 1758. fol. 436. *Lib. Min. Mic.* 1760.)

Where land was paid for with the money of A. parol evidence to shew that the purchase was made on behalf of B. refused.

A defendant having been convicted on the evidence of plaintiff (among other witnesses) of perjury, in deny-

ing a parol agreement in his answer; leave for plaintiff to file a supplemental bill, in the nature of a bill of review, stating this conviction, refused.

THIS was a bill brought by the plaintiff to compel a conveyance of an estate, which was alleged to have been bought by the defendant, upon a verbal agreement between them, for the plaintiff. There was no written agreement between them, nor had any part of the money been paid by the plaintiff. The defendant articted for the estate in his own name, and refused to convey. He denied, by his answer, having made any such verbal agreement as was stated in the bill.

The *Attorney-General*, for the plaintiff, offered to give parol evidence of the agreement; and contended, that though the agreement was by parol, yet that the trust would result by operation of law, and was therefore not within the statute of frauds.

1760.  
BARTLETT  
v.  
PICKERSGILL.

*The Lord KEEPER.*

(Without hearing the counsel for the defendant.) The question is, whether this evidence is admissible or not? which depends upon the statute of frauds. One great end of that statute was, to prevent persons coming into this court pretending that they were entitled to trusts of long terms, and sometimes of the freehold, which gave room to fraud and perjury. I think the allowing this evidence would be to overturn the statute. The statute says, that there shall be no trust of land, unless by memorandum in writing, except such trusts as arise by operation of law. Where money is actually paid, there the trust arises from the payment of the money, and not from any agreement of the parties.

But this is not like the case of money paid by one man, and the conveyance taken in the name of another: in that case the bill charges that the estate was bought with the plaintiff's money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the money was lent or not: if it was not lent, the plaintiff bought the land; but as here the trust depends on the agreement, if I establish the one by parol, I establish the other also. Were I to allow this evidence, I do not know a case where the statute would have effect. The judges have taken several cases out of the statute, as agreements in part executed. If the plaintiff had paid any part of the purchase money, it would have been a reason for me to admit the evidence; or if there had been any fraud used by the defendant to prevent an execution

1760.  
 BARTLETT  
 v.  
 PICKERSGILL.

of the agreement ; but as it is, I think that it is a case within the statute, and that the bill must be dismissed with costs.

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The defendant was afterwards indicted at *York* for perjury, in having denied the trust by his answer, and was convicted on the evidence of the plaintiff ; circumstances confirming that testimony, and upon proof by other witnesses of declarations of the defendant.

The plaintiff now petitioned for leave to file a supplemental bill, in the nature of a bill of review, stating this conviction.

The *Attorney-General*, Mr. *Perrot*, and Mr. *Wilbraham*, in support of the petition.

The *Solicitor-General contra*.

The *Lord Keeper* thought the record of the conviction was not evidence, and dismissed the petition (a).

(a) It was formerly supposed that the party aggrieved by perjury, might use the record of the conviction for the purpose of obtaining relief in equity ; and therefore it was thought an indispensable requisite, before he could be admitted as a witness on an indictment for perjury, to shew that the judgment in the suit in which the perjury had been committed, was satisfied. *R. v. Eden*, 1 *Esp. N. P. C.* 97. *R. v. Dalby, Peake*, N. P. C. 12. But upon the authority of the present case, which has been repeatedly cited and relied upon, it is now held, that there can be no objection to his admissibility, though the judgment has not been satisfied. *Abraham v. Bunn, Burr.* 2255. *R. v. Boston*, 4 *East*, 577. *Burdon v. Browning*, 1 *Taunt.* 520. *Phil. on Evid.* 87, 88, 241. *Smith v. Rummen*, 1 *Campb.* 9. *Hathaway v. Barrow*, *ib.* 151. *Attorney-General v. Woodhead*, 2 *Price*, 3.

PELHAM v. GREGORY.

(Reg. Lib. A. 1760. fol. 787.)

13th, 14th, 16th  
& 17th Nov.  
4th Dec. 1760.  
S. C.  
Amb. MSS.  
D. P.  
18th Mar. 1760.

*JOHN*, Duke of *Newcastle*, by his will, bearing date the 29th of *September*, 1707, after devising certain premises to his wife and only daughter, Lady *Henrietta Pelham*, devised all other his honours, castles, manors, &c. to the defendant, *Thomas*, Duke of *Newcastle* (by his then name and description of the Honourable *Thomas Pelham*, eldest son of *Thomas*, Lord *Pelham*), for life; remainder to his first and other sons successively in tail male; remainder to the Honourable *Henry Pelham* (another son of the said *Thomas*, Lord *Pelham*), for life; remainder to his first and other sons in tail male; remainder to *William Vane*, second son of *Christopher*, Lord *Barnard*, for life; remainder to his first and other sons, &c.; remainder to *Gilbert Vane*, the eldest son and heir of the said *Christopher*, Lord *Barnard*, for life; with remainder to his first and other sons in tail male, with remainder to his own right heirs; with a proviso, that in case any one who should be entitled by virtue of the aforesaid limitations, should prevent or hinder his leasehold and copyhold estates from going in such manner as his freehold estates were limited, such person should not take any benefit under the said will, &c.

Several suits having arisen between the said devisees and the daughter of the Duke, who had in the mean time married *Edward*, Lord *Harley*, afterwards Earl of *Oxford*; an agreement, bearing date the 30th of *June*, 1714,

(a) As to the principal point which arose in this case, see the note at the end.

A party who is plaintiff, has no right, in order to clear his own title, to bring remainder-men before the court, upon a discussion whether a prior remainder-man has title or not; and therefore a bill as against them, dismissed (a).



1760.  
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 PELHAM
 v.
 GREGORY.

was made, confirming the will, except in certain particulars therein mentioned: and an act of parliament was obtained of the 4 and 5 Geo. 1. to render that agreement more effectual, &c.

Among the leasehold premises so devised by the duke, were certain lands at *Shimpling*, called *Shimpling Park*, in *Suffolk*, of the improved yearly value of £130, which his grace held by lease from the crown, dated 3d June, 33 Car. 2. for a term of ninety-nine years, subject, together with certain other estates in *Nottinghamshire*, to £6 13s. 4d. *per annum*, payable to his Majesty, his heirs and successors.

Thomas, Duke of *Newcastle*, the first devisee for life, never had issue; but his brother, *Henry Pelham*, the second devisee for life, had issue two sons, both of whom died in his lifetime; *Thomas*, his eldest son, on the 28th of *November*, 1739, and *Henry*, his younger son, on the 27th of the same month.

William Vane, the second son of *Christopher*, Lord *Barnard*, was afterwards created Lord Viscount *Vane*, and the defendant, the present Lord *Vane*, was his only surviving son. *Gilbert*, the eldest son of *Christopher*, Lord *Barnard*, had issue *Henry*, afterwards Earl of *Darlington*, whose eldest son was the defendant, the present Earl of *Darlington*.

The plaintiff, Lady *Catherine Pelham*, who was the widow, and, with the plaintiff *West*, co-executrix of Mr. *Henry Pelham*, and also administratrix of *Thomas Pelham*, his eldest son, considering herself as thereby entitled to the estates held by leases for years, entered into an agreement in writing, bearing date the 25th of *September*, 1758, with Mr. *George Gregory* (who died after putting in his answer, leaving the defendant, *Susanna Gregory*, his executrix) for the sale of *Shimpling Park* for £1000, subject to the life estate of the Duke, and to

the contingency of his having a son born, with a covenant that the Duke would procure a new lease, &c.

This was a bill for a specific performance of that agreement, to which Lord *Vane* and the Earl of *Darlington*, as claiming some right in the premises, were made parties; who, by their answer, set forth their claims, and insisted on such legal rights as they were entitled to under the will of the Duke of *Newcastle*.

The case was argued for several days by the *Solicitor-General*, Mr. *Sewell*, and Mr. *Hoskins*, for the plaintiffs. The *Attorney-General*, Mr. *Perrot*, and Mr. *Hall*, for Lord *Vane*. Mr. *Wilbraham* for Lord *Darlington*; Mr. *de Grey* and Mr. *Browning* for the Duke of *Newcastle*; Sir *Anthony Abdy* for the defendant *Gregory*.

The Lord KEEPER.

(After stating the prayer of the bill, and the answer of the defendant *Gregory*.) Lord *Vane* and Lord *Darlington* set forth their claims, and insist on such legal rights as they are entitled to under the will of the Duke of *Newcastle*. Now the rights of these two defendants, in the condition in which this lease is at present, are legal rights; and yet, being contingent and future, they are not attended, till they come into possession, with a legal remedy. And I have no apprehension that any person can have a right to call another into this court, to make him contest here, by anticipation, a future legal right; I have as little conception that this court, when such a right is brought hither, has any jurisdiction to take cognizance of it. Nay, the very proceedings admit it, by not praying injunctions against the defendants Lord *Vane* and Lord *Darlington*, which is the only method by which this court can determine their claims. Why, then, I am desired to determine their claims *quoad Gregory*, though not as

1760.

PELHAM
v.
GREGORY.

Dec. 4.

1760.
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 PELHAM  
 v.  
 GREGORY.

against the claimants; and what was most ridiculous, *Gregory*, by her counsel, almost prayed me so to do. At the same time, when I look into his answer, he insists that he ought not to be compelled to perform his agreement, till the claims of the defendants are determined.

Suppose the Duke of *Newcastle* had been dead without having had issue male, and this bill had been before me, with the present answers, all I could have done would have been to have retained the bill till Lord *Vane* had an opportunity of trying his right at law. For I want no cases or precedents to inform me, that no purchaser should be decreed specifically to perform an agreement, where a claim is set up against the title of the vendor, legal, new, and without a precedent on record or in print. Much less can I decree a specific performance where a future contingent right is objected to the title, where my judgment would annihilate the legal right and remedy before it came into possession; when, if I had left it in *statu quo*, the twelve learned judges might have been of a different opinion.


But I cannot help thinking that these bills are very dangerous in their example to the subject, and not very suitable to the dignity of this court. Persons in remote contingent remainders, or future casual contingent interests, are brought into court, at a great expense, to set forth and maintain these sorts of rights, whenever it suits the convenience of the present possessors; when, if the course of events had been waited for, no questions would have arisen, no expenses would have been incurred.

It may be *convenient* in the present case to the plaintiffs, but no complaisance should dwell within these walls; and when with one eye I look upon the convenience of plaintiffs, I must with the other as steadily observe the inconvenience of defendants.

But, really, when I reflect on the conduct of the de-

fendant *Gregory*, cautious in his answer, careless at the bar, I cannot bring myself to believe that I am deciding a contest of right; but that this bill is brought in aid of an unmarketable title, to be warranted by a judgment of this court: and were I to countenance it, I might see bills brought hereafter under pretence of a specific performance of articles, in all cases where conveyancers have their doubts (and great Pyrrhonists they are), to have the opinion of the court. There might be an ostensible agreement to be read, and a separate article that the agreement should be of no effect unless the title were confirmed by the judgment of this court affirmed on appeal.

As in this case, therefore, the claims of Lord *Vane* and Lord *Darlington* are not within my cognizance to determine, I cannot decree a specific performance against *Gregory*, and must therefore dismiss this bill, with costs as against Lord *Vane* and Lord *Darlington*, and without costs as against *Gregory*, who appears to be the plaintiff's instrument on this occasion.

1760.  
  
 PELHAM  
 v.  
 GREGORY.

So much of this decree as dismissed the bill against *Gregory*, was afterwards reversed in the *House of Lords*, 3 Bro. P. C. Ed. Toml. 204; it being held, that the estate vested absolutely in *Thomas Pelham*, subject only to the contingency of the duke's having issue. The *Lord Keeper* is reported on several occasions to have expressed his approbation of that reversal, particularly in *Le Rousseau v. Rede*, post. Vol. II. p. 1,

and in Lord *Beaulieu v. Lord Cardigan*, Amb. 533, in which case he determined the same point accordingly, which determination was affirmed in the *House of Lords*. 3 Bro. P. C. Ed. Toml. 277.

The dismissal, however, of the bill against Lord *Vane* and Lord *Darlington*, with costs, was affirmed on the appeal. Lord *Redesdale*, in *Devonsher v. Newenham*, 2 Sch. & Lef. 210, considered this to be a decisive authority,

1760.  
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 PELHAM
 v.
 GREGORY.
 [*523]

and had no doubt but that many other cases might be *found, where bills had been dismissed on that ground. The court being bound to see that the parties before it were such as it ought to bind by its decree.

in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life, *vid. Giffard v. Hort*, 1 Sch. & Lef. 408. *Lloyd v. Jones*, 9 Ves. 55. *Cockburn v. Thompson*, 16 Ves. 326, and the authorities there cited.

As to the rule that it is sufficient to bring before the court the first tenant in tail

12th. 85.

BELCHIER v. BUTLER.

RENFORTH v. IRONSIDE.

4th Dec. 1760.

(*Reg. Lib. A. 1760. fol. 187.*)

Third mortgagee, having, *pendente lite*, and after the first mortgagee had by his answer submitted (on payment of the money due to him) to assign to the plaintiff, the second mortgagee, obtained an assignment of the first mortgage, decreed to be entitled to hold the estate against the second mortgagee till he should be paid what was due to him upon both, he having had no

JOHN BUTLER, an attorney, being seised in fee of a piece of ground in the parish of *St. Mary Magdalen, Bermondsey*, together with several new-built brick messuages erected upon it, in *February*, 1742, borrowed of *James Pace* a sum of £600; and to secure the repayment of the same, by indentures of lease and release, dated the 27th and 28th of *February*, 1742, mortgaged the said premises to *Pace*. On the 29th of *July*, 1747, *Butler* paid *Pace* all interest then due for the £600, and also £300 in part of the principal; and he afterwards paid *Pace* all interest for the remaining £300 up to the 28th of *February*, 1754.

By lease and release, dated the 22d and 23d of *October*, 1744, *Butler* mortgaged the same premises to *Rebecca*

notice of the second mortgage, when he advanced his money.


Jarvis and Robert Watson, for securing £500 and interest, and he at different times afterwards paid off £200 of this sum.

John Butler, by indentures of lease and release, dated the 30th of *September* and 1st of *October*, 1747, mortgaged the same premises to the plaintiff *Belchier*, and *Ironside*, for securing £800, and interest.

And by indenture dated the 30th of *November*, 1751, he demised the same premises to *Mary Butcher* for 99 years, for securing £1000, and interest; and afterwards by another indenture, dated the 27th of *June*, he charged the same premises with the payment of the further sum of £500, and interest, to the said *Mary Butcher*.

By other indentures of lease and release, dated the 10th and 11th of *October*, 1752, *Butler* mortgaged the same premises to the defendant *Renforth*, for securing £1200, and interest, and on the same day he charged the premises with the payment of a further sum of £800, and interest, and delivered to him the complete title-deeds of the mortgaged premises.

On the 14th of *December*, 1755, *Butler* died, having made his will, dated the 4th of *January*, 1754, and thereby, after directing the payment of his just debts, he gave and devised the residue of all his real and personal estate to *Elizabeth Butler*, his widow. Soon after the death of *Butler*, the defendant caused declarations in ejectment to be delivered to the several tenants in possession of the premises, whereupon *Belchier* and *Ironside*, on the 16th of *March*, 1756, filed their bill against him and *Elizabeth Butler*, *James Pace*, *Thomas Pierce*, and *Mary Butcher*, praying that the defendants, *Pace*, *Pierce*, and *Butcher*, might severally set forth their interest in the premises, together with their securities, and how much was due thereon, and how their debts arose,

1760.

 BELCHIER
 v.
 BUTLER.
 RENFORTH
 v.
 IRONSIDE.


1760.
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 BELCHIER  
 v.  
 BUTLER.  
 RENFORTH  
 v.  
 IRONSIDE.

and that the defendant *Renforth* might set forth what interest he claimed therein, &c.

The defendant *Renforth*, by his answer, insisted upon his mortgage for £1200, and the further charge of £800, and denied that, at the time of lending his money, he had any notice whatsoever of the mortgage of the plaintiffs, or any prior mortgage or incumbrance made to them, or to any other person or persons of the said premises; but that when he advanced the said £1200 and £800 to *Butler*, he had reason to suppose, from the production and delivery of the title-deeds of the premises, and the counterparts of the tenants' leases, and did believe, that *Butler* had a clear title to, and power to convey and mortgage the same, without being subject to any prior incumbrance.

The defendant *James Pace*, who was the first mortgagee, by his answer, stated his mortgage for £600, and interest, by indentures of lease and release, dated the 27th and 28th of *February*, 1742, and said that *Butler*, about the time of the execution of such indentures, delivered to him several deeds or writings, which, as he believed, related to the title of the mortgaged premises; but that *Butler*, on the 27th of *August*, 1744, applied to him to see the title-deeds and writings so left with him, and faithfully promised, that if the defendant would trust him with the same, he would shortly return them to him; that *Butler* being his attorney, in whom he placed great confidence, and relying on his integrity and promise, he was prevailed on, and did, about the 27th of *August*, 1744, redeliver all such deeds and writings to *Butler*, except the indentures of the 27th and 28th of *February*, 1742; and *Butler* at the same time, by a writing under his hand, promised to return the same to him on demand; that he several times afterwards applied to *Butler* to re-

deliver such deeds, and *Butler* often promised that he would return the same to him, but never did. That *Butler*, on the 28th of *February*, 1754, paid him all interest then due for the £600, and also £300 in part, so that the principal sum of £300 only, with interest for the same, remained due to the defendant on his said mortgage; and upon payment thereof, he submitted to assign his mortgage to the plaintiff *Belchier* and *Ironside*, or as they should direct.

1760.  
  
**BELCHIER**  
*v.*  
**BUTLER.**  
**RENFORTH**  
*v.*  
**IRONSIDE.**

The cause being at issue, and witnesses being examined on both sides, came on to be heard on the 11th of *July*, 1758, when, it being objected that *Belchier* was not before the court in his own right, but only as one of the executors of *Edward Ironside*, his lordship was pleased to order that the cause should stand over, with liberty for *Belchier* and *Ironside* to amend their bill.

The defendant *Renforth*, pending this cause, in order to strengthen his title, and to gain a priority, paid off all principal and interest due to the defendant *Pace*, the first mortgagee on his mortgage; and by indentures of lease and release, dated the 5th and 6th of *December*, 1757, *Pace*, in consideration of £356 10s. 9d., conveyed the premises to the defendant, his heirs and assigns for ever, subject to the proviso of redemption contained in the indenture of release of the 28th of *February*, 1742, and the plaintiffs having amended their bill, he, on the 20th of *March*, 1758, filed his cross bill against them, and also against the said *Elizabeth Butler* and *Mary Butcher*, praying that the said *Elizabeth Butler* might come to an account with him for the said three sums of £1200, £800, and £356 10s. 9d., and all interest due or to grow due thereon, &c.

The *Attorney-General*, the *Solicitor-General*, and Mr. *Pechell*, for the plaintiffs in the original bill.

It is an established rule in equity, that, as between incumbrancers, having only equitable securities, the doc-



1760.  
 ~~~~~  
 BELCHIER
 v.
 BUTLER.
 RENFORTH
 v.
 IRONSIDE.

trine *qui prior est tempore potior est in jure* shall prevail, because neither of them having the legal title, there can be no ground for a court of equity to take from a prior incumbrancer, in favour of a subsequent incumbrancer, that right which he was possessed of before the latter became an incumbrancer. Such was the situation of the plaintiffs at the commencement of the original cause, and until it first came on to be heard. This principle is laid down in the case of *Brace v. the Duchess of Marlborough*, 2 P. W. 491, where there are at the same time several rules enumerated, upon which prior incumbrancers have been postponed: but these rules are so harsh and inequitable, that the court will catch at every circumstance to enable it to take a case out of its operation. It is too late, indeed, now, to deny that a subsequent equitable incumbrancer may, *pendente lite*, by taking an assignment of the legal security, enable himself to tack his equitable to his legal incumbrance, to the prejudice of a mesne incumbrancer; but even this is admitted with great jealousy, and confined to purchases before a decree. *Earl of Bristol v. Hungerford*, 2 Vern. 526, *Wortley v. Birkhead* (a). But in all these cases the conscience of the party purchasing must not be affected, and his right must be unrestrained and unqualified. The present question therefore is, not whether Mr. *Renforth* could buy this security *pendente lite*, but whether Mr. *Pace*, by the submission contained in his answer, has not prevented him from doing it with a clear conscience and unlimited right. Mr. *Pace* has submitted, by his answer, to assign his legal security to the plaintiffs, and that the estate should be sold, and all the incumbrances paid off according to their respective priorities. In thus submitting to a sale he has waived his right to any other remedy, and must not assign to any one but the plaintiffs. This answer must be considered as

(a) 3 Atk. 811. 2 Ves. 571.

stripping Mr. *Renforth* of any benefit he might have had if such answer had never been put in.

Such is the situation of *Renforth*, which cannot at all events put him in a better situation than *Pace* was in at the time of the assignment of the mortgage. But *Pace* himself (under the authority of several cases, where gross negligence has been proved in the mortgagee) might be postponed to subsequent innocent incumbrancers. For he had the title-deeds of the estate delivered to him at the time of making the mortgage, and re-delivered them back to the mortgagor.

Mr. *Perrot*, Mr. *Wilbraham*, and Mr. *Coxe*, for the defendant *Renforth*.

The general rule that securities may be bettered *pendente lite*, by buying in earlier incumbrances, is founded upon the soundest principles. For the third mortgagee having lent his money without knowing that the second had any claim upon the estate, has in conscience as good a right to be paid the whole money that he has lent, as the second mortgagee has to the payment of what he has advanced. To that amount he is a purchaser for a valuable consideration, and having, by an assignment of the first mortgage, got both law and equity on his side, this court will not interpose to take the legal protection from an honest debt. In *Edmunds v. Povey*, 1 Vern. 187, the Lord Keeper said this was the constant course of the court, and wondered how the counsel laid their shoulders to a point that had been so long settled. As to the submission in Mr. *Pace*'s answer, the case is not at all prejudiced by that; he could do no more than bind his own rights, and cannot by any act of his affect the situation of the different incumbrancers, nor could the submission to a sale have any further effect, for the rights of the mortgagees are not altered by it. Of all the numerous cases

1760.

BELCHIER
v.
BUTLER.
RENFORTH
v.
IRONSIDE.

1760.

BELCHIER

v.

BUTLER.
RENFORTH

v.

IRONSIDE.

of a subsequent incumbrancer purchasing *pendente lite*, that which most resembles the present is the case of *Turner v. Richmond*, 2 Vern. 81, where the first mortgagee acknowledged by his answer, that he was satisfied, and afterwards assigned to a subsequent incumbrancer, yet the court refused to interpose. As to Mr. *Pace*'s returning the deeds, it can have no effect, for it hurt nobody. The two mortgagees have been so negligent, that they are entitled to no favour.

The Lord KEEPER.

12th 85. It is now near a century since the doctrine was first settled, upon long argument and mature deliberation, that a third mortgagee, having lent his money without notice of a second, may, by paying off the first, hold the estate against the second till he has been paid what is due to him upon both. This is what Lord *Hale* called the *tabula in naufragio*, and it has continued to be the practice ever since without any variation. A second mortgagee, therefore, when he lends his money upon an equity of redemption, is aware, or ought to be aware, that he is liable to be postponed by the subsequent incumbrancer getting an assignment of the first mortgage: and a second incumbrancer, confiding in the notoriety and certainty of this rule, is induced to buy in the first incumbrance at a new expense.


The principle upon which this doctrine was first established, and has ever since prevailed, has been very correctly stated at the bar. For the third mortgagee having innocently lent his money without notice of the existence of the second, has in conscience as good a right to receive the whole money he has lent, as the second mortgagee has to be paid what he may have advanced, and then, by the assignment of the first mortgage, and the possession

of the title-deeds, he gets both law and equity on his side: and against that a court of conscience will not interpose to strip him of his protection.

This rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money: for it is by the lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced: and therefore, when that danger is first discovered to him (whether it be by a suit in equity, or by any extra-judicial means), as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced. Hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*.

But it is said that *Pace*, by the submission in his answer, had precluded both himself from assigning to *Renforth*, and *Renforth* from purchasing from him. But I am of opinion, that, upon the principles which I have stated, the answer of *Pace* can in no way be considered as affecting the conscience of *Renforth*. I think that the submission, taken in its fullest extent, could only bind the rights of the person submitting, and could not be considered as extending to those of subsequent incumbrancers. Now this right of protection, of which I have been speaking, is not claimed by the third mortgagee as derived from the first, but arises from his personal situation, and attaches originally to himself the moment he obtains the legal interest in the estate.

But suppose this submission, instead of having been made by the first mortgagee, had been made by the third, could it have had the effect which is contended for? The rights of the mortgagees are not altered by turning the

1760.

BELCHIER
 v.
BUTLER.
RENFORTH
 v.
IRONSIDE.

1760.

BELCHIER

v.

BUTLER.

RENFORTH

v.

IRONSIDE.

mortgaged estate into money, for the court directs the money to be applied according to the rights of redemption. Therefore, if the second mortgagee has no right to redeem the estate till he has paid what is due upon the first and third mortgages, he will of course have no right to partake of the money till their claims are settled.

I am therefore of opinion, that *Renforth*, by virtue of the assignment of the defendant *Pace*'s mortgage, is entitled to hold the premises till satisfaction of the money due on his three several mortgages (a).

This decree was affirmed in *Dom. Proc.* 9 Feb. 1764. 5 Bro. P. C. Ed. *Toml.* 292.

(a) See the cases on this head, collected by Mr. Cox in his note to *Brace v. Duchess of Marlborough*, 2 P. W. 491, and Mr. Nolan in his note to *Hagshaw v. Yates*, *Stra.* 240. *Baker v. Harris*, 16 Ves. 397; but that a mortgagee cannot tack as against assignees in bankruptcy a mortgage subsequent to an act of bankruptcy, *vid. Latouche v. Lord Dunsany*, 1 Sch. and Lef. 152. *Ex parte Knott*, 11 Ves. 619. *Ex parte Herbert*, 13 Ves. 183.

6th, 9th, & 10th

Dec.

1760.

S. C.

Amb. 388.

FORRESTER v. COTTON.

(Reg. Lib. 1760. fol. 138.),

Part of testator's estate being in settlement, he devised all his estates, &c. in general words:

held, that there was not such an indication of his intention to dispose of that over which he had no power, as to induce a court to compel the devisee to elect.

SIR THOMAS TYRRELL had two sons, *Harry* and *Charles*. By indenture, bearing date the 21st of *October*, 1692, upon the marriage of *Harry* with *Hester Blount*, Sir *Thomas* and *Harry* settled several estates to the use

of *Harry* for life; remainder, as to part, to *Harry's* wife for life; remainder to trustees for 400 years, to raise portions for younger children: remainder, as to the whole, to the first and other sons of *Harry* in tail male; remainder to Sir *Thomas* in tail male; remainder to the right heirs of Sir *Thomas*. Sir *Harry* died *November* the 8th, 1708, leaving five children, viz. *Thomas*, *Harry*, *Frances*, *Penelope*, and *Charles*.

1760.
FORRESTER
v.
COTTON.

In 1717 Sir *Thomas*, the son, suffered a recovery of all the estates in the lifetime of his mother to the use of himself in fee (but the mother did not join in making a tenant to the *præcipe*), and Sir *Thomas* afterwards died intestate on the 25th of *December*, 1718.

Upon his death, *Harry*, his brother, became entitled, and afterwards made his will, and devised all his manors, messuages, lands, tenements and hereditaments whatsoever, whereof he was seised, or whereto he was entitled, and of which he had any manner of power to dispose, to the use of his brother *Charles* for life; remainder to his first and other sons in tail male; remainder to his uncle *Charles* for life; remainder to his eldest son *Thomas* for life; remainder to the first and other sons of *Thomas* in tail male, with remainders over; with the last remainder to his own right heirs. He died the 7th of *November*, 1720, without issue.

Sir *Charles* died the 20th of *November*, 1758, without issue male, leaving the defendant, *Hester Maria Cotton*, wife of Doctor *Cotton*, and heir at law to himself and his brother; *Charles*, the uncle, left issue male, *Thomas*, who, upon the death of the jointress in 1752, entered upon the jointured part of the estate; and claiming to be entitled thereto under the settlement of 1692 (the prior limitations being spent, and the recovery suffered by Sir *Thomas* not affecting that part of the estate), suffered a recovery thereof, and declared the uses to himself in fee, and after-

[533]

1760.
 ~~~~~  
 FORRESTER  
 v.  
 COTTON.

wards died, without issue, on the 10th of *February*, 1755, leaving the plaintiffs, *Frances* and *Penelope*, his sisters and heirs at law.

The limitations under the will of Sir *Harry* being spent, the defendant *Cotton*, in right of his wife, became entitled to that part of the estate which was not in jointure at the time the recovery was suffered by Sir *Thomas* as heir at law to Sir *Harry*; and having got into possession of the other part of the estate which was in jointure, the plaintiffs brought an ejectment for the jointured lands; but the settlement being in the hands of *Cotton*, and the portions to be raised by the term of 400 years in the settlement of 1692 not being paid, this bill was brought for an account of rents and profits of the premises, whereof Sir *Thomas*, the plaintiff's brother, suffered the recovery, being the premises which were in jointure when the first recovery was suffered; and upon payment of the portion remaining due under the term of 400 years, to have an assignment of the trust term, and to have deeds delivered up.

The defendants, the *Cottons*, by their answer, insisted, First, That the recovery suffered by Sir *Thomas* in 1717, comprised the lands in jointure, and that the mother ought to be presumed to have joined in making a tenant to the *præcipe*; and Secondly, That the devisees, under the will of Sir *Harry*, having enjoyed the lands which were not in jointure, were bound by the devise of the lands which were in jointure.

The *Solicitor-General* and Mr. *Perrot* for the plaintiffs.

As to the first point, any presumption which might be raised in favour of the mother's joining, is rebutted by the circumstance of the jointure estate being excepted out of the deed to lead the uses. Upon the second point as to election. In all the cases of election, the thing in-

tended to be disposed of without power is always specified, and is devised, or expressed to be devised, by an express or implied condition ; but unless the testator specifies the lands, there is no method of discovering that he intended to give that, over which he had no right. Therefore where a person is seised of lands in fee, and of others in tail, if he devises generally, the devise will only be considered as relating to the lands in fee ; for nothing appears on the will to shew that he meant to pass more ; but if he specifies them, the intention is apparent, and the devisee must be put to his election.

The *Attorney-General* and Mr. *Willes* for the *Cottons*; Mr. *Wilbraham* for the other defendants.

There is sufficient here, after the lapse of time, to justify the court in presuming that the mother joined. Sir *Thomas* and she were upon the best terms, and it was natural that she should join. As to the point of election, *Noys v. Mordaunt*, 2 *Vern.* 581, and *Jenkins v. Jenkins* (a), *cor. Talbot*, are direct authorities to shew that a devisee cannot claim both under and against a will. There can be no doubt of Sir *Harry's* intention that the whole should pass : he was desirous to settle the whole estate, and goes through the whole family. The settlement would not have been complete if the whole had not gone. It is a conditional devise of the fee-simple estate to the several tenants, under the old settlement of 1692, that they shall permit the unbarred estate tail in the jointure lands to go according to the new limitations. These cases are not peculiar to our law, and are founded on principles of universal equity.

*The Lord KEEPER.*

I shall not enter at all into the first question : if the 10th December.

(a) Reported, *Belt's Supplement to Vesey*, 250.

1760.  
FORRESTER  
v.  
COTTON.

[ 535 ]



1760.  
  
**FORRESTER**  
 v.  
**COTTON.**

parties think it necessary to be determined, I shall send it to law.

Upon the second point. It has been truly stated by Mr. *Attorney-General*, that the defence to the title in equity is founded upon principles which prevail in the laws of all countries ; but it is necessary that these principles should be confined within reasonable bounds. The intention of the testator ought to be clear and manifest. It should appear that he knew that he had no right to dispose of the lands ; and yet, that knowing it, he takes upon himself to dispose of them. But there is no instance where general words have been held to come within this rule, nor do I see how the testator's intention can be collected with sufficient certainty from them. In both the cases cited at the bar, the lands were specified, which differs the present case from them, where the words are general (a).

(a) It is difficult to reconcile the several *dicta* and decisions on this point. Lord *Rosslyn*, in *Rutter v. Maclean*, 4 *Ves.* 537, strongly approved of the argument, that where a man disposes of all his estate, it is not a fair inference that he means to dispose of what is not his estate ; and both Lord *Rosslyn* and Lord *Eldon*, in *Pole v. Lord Somers*, 6 *Ves.* 322, disapproved of the decision in *Pulteney v. Lord Darlington*, *inf.*, and the latter agreed to the application of the rule, if it proceeded “ upon a manifestation

in the will itself, that he means to call that his own, which, in a legal sense, is not his own.” So in the case of *Blake v. Bunbury*, 1 *Ves. jun.* 523. S. C. 4 *Bro. C. C.* 21, Lord Commissioner *Eyre* observed, that “ the intent of the testator to dispose of that which is not his, ought to appear upon the will ; ” “ that it ought to appear by declaration plain or necessary conclusion from the circumstances ; and no man ought, under pretence of this rule, to be spelt or conjectured out of his property.” In the

I think, also, that these principles must be confined to plain and simple devises of the inheritance, and cannot be extended to limitations: they proceed upon the notion of a condition (*a*), and I much doubt whether such a condition can be coupled with a partial estate. It would cause great confusion, for the devise would be good or not, just as the devisee in remainder chose to submit to the will. It would create an unknown species of estate, *ad voluntatem curiæ cancellariæ* (*b*).

1760.  
FORRESTER  
v.  
COTTON.

The defendants, Dr. Cotton and his wife, declining to try their title at law, the decree was made against them, according to the prayer of the bill (*c*).

[ 537 ]

above noticed case, however, of *Pulteney v. Lord Darlington*, the same learned judge is reported (6 *Ves.* 400.) to have said, that "he did not agree with the position laid down, that a testator does not mean to give what is not his; though the subject may not be his, he may think it his, and give it as such;" and the court in that case admitted the accounts of General *Pulteney*, given in to him by his steward, to be admitted as evidence, to shew that he treated an estate tail as his own. And in *Druce v. Denison*, 6 *Ves.* 385, a statement of property, written by the testator, and his books of accounts, were admitted as

evidence that he considered as his property, and meant to dispose of property not strictly his own.

(*a*) "Lord C. J. *de Grey* would not put it upon an implied condition, but considered it as a natural equity." 4 *Ves.* 538. & 2 *Ves.* jun. 560.

(*b*) This doctrine has been overruled by the later cases.

(*c*) The principal modern cases upon the doctrine of election, are, *Pettitward v. Prescott*, 7 *Ves.* 541. *Sheddon v. Goodrich*, 8 *Ves.* 481. (where all the prior cases are collected). *Birmingham v. Kirman*, 2 *Sch. & Lef.* 449. *Rich v. Cockell*, 9 *Ves.* 369. *Andrew v. Trinity Hall*, *ib.* 532. *Blunt v. Clitherow*,

1760.  
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 FORRESTER
 v.
 COTTON.

(and cases cit. *ib.*) 10 *Ves.* 2 *Meriv.* 86. *Tibbits v. Tib-*
 589. *Broome v. Monck, ib.* *bits, ib.* 96. *S. C.* 1 *Jacob,*
 616. *Judd v. Pratt, 13 Ves.* 317. *Dillon v. Parker, 1*
 173. *Thellusson v. Wood-* *Swa.* 359. affirmed on appeal,
ford, ib. 209. *Lord Rendle-* 1 *Jacob,* 505. *Gretton v.*
sham v. Woodford, 1 Dow. *Haward, 1 Swa.* 409. As
 249. *Brodie v. Barry, 2 V.* to the application of the doc-
 & *B.* 127. *Welby v. Welby,* trine to copyholds, *vid. Unell*
ib. 187. *Chalmers v. Storil,* *v. Wilkes, post.* Vol. II. 189.
ib. 222. *Dashwood v. Pey-* and as to putting widow to
ton, 18 Ves. 41. 48. *Lord* her election, *Arnold v. Kemp-*
Rancliffe v. Lady Parkyns, *stead, ib.* 237.
6 Dow. 149. *Green v. Green,*

END OF VOL. I.

